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FILED

No. (1) 10-932 JAN 18 2011

OFFICE OF THE CLERK

In The
Supreme Court of the United States

PAM HEIN, STATE'S ATTORNEY OF CHARLES MIX COUNTY; KEITH MUSHITZ, MEMBER OF THE CHARLES MIX COUNTY, SOUTH DAKOTA, COUNTY COMMISSION; NEIL VONESCHEN, MEMBER OF THE CHARLES MIX COUNTY, SOUTH DAKOTA, COUNTY COMMISSION; JACK SOULEK, MEMBER OF THE CHARLES MIX COUNTY, SOUTH DAKOTA, COUNTY COMMISSION,

Petitioners,

v.

YANKTON SIOUX TRIBE AND UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

PAMELA HEIN
Charles Mix County
State's Attorney
P.O. Box 370
Lake Andes, SD 57356
(605) 487-7441

SCOTT GREGORY KNUDSON
BRIGGS AND MORGAN, P.A.
2200 IDS Center
Minneapolis, MN 55402
(612) 977-8400

TOM D. TOBIN
Counsel of Record
P.O. Box 730
422 Main Street
Winner, SD 57580
(605) 842-2500
tobinlaw@gwtc.net

Attorneys for County Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether Congress disestablished the Yankton Sioux Reservation in the Act of 1894, 28 Stat. 286, as the South Dakota Supreme Court held in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999). In contrast, the court of appeals in the decision below ruled that the reservation had not been disestablished by that act of Congress.

LIST OF PARTIES

The caption of the case contains the names of all the parties to the proceeding, except Dennis Daugaard, Governor of South Dakota; Marty J. Jackley, Attorney General of South Dakota; and Southern Missouri Waste Management District.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on May 6, 2010, insofar as the judgment and opinion find that the Yankton Sioux Reservation has not been disestablished.

OPINIONS BELOW

The amended opinion of the Eighth Circuit is reported at *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010) and is reprinted in Appendix I (App. I) at 1-51. The Eighth Circuit issued an Order on Petitions for Rehearing, reported at *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985 (8th Cir. 2010) and reprinted at App. I, 52-70. The opinion of the Eighth Circuit which was later amended is reported at *Yankton Sioux Tribe v. Podhradsky,* 577 F.3d 951 (8th Cir. 2009) and is reprinted at App. I, 71-121. The Memorandum Opinion and Order of the District Court for the District of South Dakota is reported at *Yankton Sioux Tribe v. Podhradsky*, 529 F.Supp.2d 1040 (D.S.D. 2007) and is reprinted at App. I, 122-163. The earlier opinion of the Eighth Circuit is reported at *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999) and is reprinted at App. I, 199-249. The Memorandum Opinion and Order of the District Court for the District of South Dakota is reported at *Yankton*

Sioux Tribe v. Gaffey, 14 F.Supp.2d 1135 (D.S.D. 1998) and is reprinted at App. I, 250-320.

STATEMENT OF JURISDICTION

The judgment of the Eighth Circuit was entered on May 6, 2010. The Eighth Circuit denied timely petitions for rehearing and suggestions for rehearing en banc on September 20, 2010. App. I, 364-365. The Honorable Samuel Alito, Associate Justice, on December 14, 2010, extended the time for the filing of Petitions for Writ of Certiorari to January 18, 2011. App. I, 366. The jurisdiction of this Court is invoked under 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Treaty with the Yankton Sioux, 1858, ratified, 11 Stat. 743 (1859) is reprinted at App. I, 367-379.

The Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, 1892, ratified, 28 Stat. 286, 314 (1894) is reprinted at App. I, 380-394.

SUMMARY

> [T]he United States, because of its special relationship with the Indian Tribes, has a

> strong interest in protecting the integrity of reservation boundaries.

Br. for the United States Supp'g Respt's at 1, *South Dakota v. Yankton Sioux Tribe*, (No. 96-1581).

This case can be summarized in a few paragraphs. It does not come to this Court on a clean slate. In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), this Court decided unanimously to reverse the court of appeals, commenting on the "absurd" results of resurrecting reservation boundaries deemed disestablished for almost a century in a number of other decisions from the South Dakota Supreme Court. App. I, 321. In his dissent, Judge Magill perceived an almost "single-minded desire to avoid diminishment at all costs." *Yankton Sioux Tribe v. Southern Missouri*, 99 F.3d 1439, 1462 (1996) (Magill, Frank J., dissenting).[1] Nothing has changed in this regard.

Following the lead of the United States, the district court and the court of appeals fashioned a series of disconnected "Yankton Reservations" out of whole cloth, in a decision that squarely conflicts with a century of state and federal precedent, including the latest decision of the South Dakota Supreme Court in *Bruguier v. Class*, 199 S.D. 122, 599 N.W.2d 364 (S.D. 1999), discussed below at 28-33.

In this Court in *Yankton Sioux Tribe*, the County tracked the role that the shifting arguments of the

[1] Judge Magill retired in 2007

United States have played in reservation status litigation in this Court starting in 1962. Br. of Charles Mix County, App. II, 460-503. The arguments of the United States supporting the resurrection of reservation boundaries have been squarely rejected by this Court in every case since 1973, except one. The County has appended the briefs of the United States and the transcripts of oral arguments of the United States in each reservation status case decided by this Court, including *Yankton Sioux Tribe*, to show the shifting sands from which the United States argues. App. II, 808-859. The arguments of the United States are discussed *infra* at 35.

The decision of *Bruguier*, decided after *Yankton Sioux Tribe*, is the most recent South Dakota case on point. The court of appeals' and *Bruguier*'s direct conflict is addressed *infra* at 16-33.

1. This Court would have authoritatively resolved the status of the Yankton Reservation in *Yankton Sioux Tribe*, but for one reason. Simply stated, this Court was misled by the United States and the Tribe with reference to the question of whether the Tribe had ceded all of the unallotted lands or retained some of the tribal lands in common. The transcript for oral argument demonstrates the significance of the misrepresentation on this crucial point.

> Court: What other tribal lands? I mean, that's crucial to me, I thought all the tribal lands, all the communally owned lands were given to the United States. That's – that's certainly what this –

Tribe: No. No.

Court: No?

Transcript of Oral Argument, *Yankton Sioux Tribe*, 522 U.S. 329 (1998) (emphasis added), App. II, 845. As a result, this Court remanded the case for a decision on this point (whether the Reservation was entirely disestablished).

After the remand, the district court was reversed again by the court of appeals in *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999), for continuing to recognize the original 1858 reservation boundaries that this Court in *Yankton Sioux Tribe* held were disestablished. In the process, the district court and the court of appeals recognized that the cession did not reserve any land in common for the Tribe (contrary to the express statements of the United States and the Yankton Sioux Tribe in oral argument in this Court). *Yankton Sioux Tribe* was a complete cession, identical in every significant respect with the cession in *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

The *Gaffey* panel, however, avoided the disestablishment conclusion in this case by, *without briefing*, taking one sentence in the *Yankton Sioux Tribe* opinion out of context. That sentence involved *ceded* agency lands. In *Yankton Sioux Tribe*, this Court cited the agency provision as a somewhat contradictory provision that counseled against finding reservation termination in the context of the State's and the Tribe's conflicting positions regarding the status of the original 1858 reservation boundaries. And, the Court quoted the reliance in *Solem v. Bartlett* on a

similar agency provision in support of the continued existence of original reservation boundaries around the area in *Solem*.

2. Even the United States acknowledged that the court of appeals did not explain the agency decision. In *Yankton Sioux Tribe*, the agency provision was not persuasive in terms of preserving the *original* reservation boundaries. In *Solem*, the original reservation boundaries were deemed to be preserved for a number of reasons. *Significantly, in neither case was the agency provision probative of establishing 18 USC §1151(a) reservation boundaries around each noncontiguous tract of agency land ceded pursuant to this provision* (or any other trust land for that matter).

In context, this provision is not "strong evidence" of preserving an 18 USC §1151(a) agency reservation, as the court of appeals incorrectly held (approximately 1,000 acres of noncontiguous 18 USC §1151(a) reservation). (Especially in light of the fact that the United States earlier acknowledged that reservation boundaries were not even addressed during negotiations.) Br. of the United States at 3; *Yankton Sioux Tribe v. Southern Missouri*, 99 F.3d 1439 (8th Cir. 1996) (J. Magill dissenting). At the time, the Yankton Sioux Tribe told this Court that the holding conflicted with every United States Supreme Court opinion.

Seizing upon this misapplication of one sentence in *Yankton Sioux Tribe* by the *Gaffey* panel, the United States convinced the district court to recognize extensive 18 USC §1151(a) noncontiguous reservation boundaries. They are around every single tract of trust land in the entire original reservation area (at least 37,000 acres and maybe another 6,000 acres or another 230,000 acres of fee lands), including all individual allotments, contrary to all state and federal precedent. Early on, the attorney for the Yankton Sioux Tribe predicted that "drawing a boundary around each parcel of trust land . . . would result in an *absurdity*, and realistically cannot be done." Plaintiff's Response Brief to State and County Brief on Status of Reservation Lands and Existence of Boundaries (October 24, 2007) (emphasis added). Nevertheless, that was the decision of the district court.

The court of appeals affirmed the district court with apparently the same single-minded desire to support any reservation boundary noted in the dissent to the court of appeals' initial decision. *In this instance, however, neither the United States nor the Yankton Sioux Tribe ever claimed a Yankton Reservation with this configuration.*

In the process, the district court and the court of appeals continued to ignore nearly a century of state and federal precedent, disregarding the fact that in *Yankton Sioux Tribe* this Court expressly noted the significance of the decisions of the South Dakota

Supreme Court in this case ("we granted certiorari to resolve a conflict between the decision of the court of appeals and a number of decisions of the South Dakota Supreme Court . . . ") and cited the state decisions with approval, *Yankton Sioux Tribe* at App. 342. Petitioners regret that it is necessary to even request this Court to take some action in this case again.[2]

In the end, the court of appeals did reference the South Dakota Supreme Court in a two-sentence footnote that summarily dismissed *Bruguier*, as simply "more sweeping than necessary."

Initially, the United States and the Tribe both recognized that *Bruguier* did conclude that the Reservation was "wholly disestablished," as they told this Court at the time in Applications for an Extension of Time, 5 n.1, *United States v. Yankton Sioux Tribe*; 4 n.1, *Yankton Sioux Tribe v. Gaffey*; *South Dakota v. Yankton Sioux Tribe*, *Yankton Sioux Tribe v. Gaffey* (Nos. 99-1490 and 99-1683). Of course, that concession will not be repeated this time. Rather, we now expect the United States and the Tribe to continue to submit arguments to undermine *Bruguier*, in order to minimize a conflict that would otherwise be worthy of the attention of this Court.

In short, following the lead of the United States, the district court and the court of appeals repeatedly

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[2] In this light, the Counties agree that something less than plenary attention may be appropriate in this instance, including summary consideration in conformity with *Bruguier*. *See* Pet. for Writ of Cert. filed by the State of South Dakota concurrently with this Petition, 38 n.9

failed to give proper weight to the "very strong presumption," "nearly irrebuttable," "an almost irrebuttable presumption" of diminishment/disestablishment, that would take "a whole lot – not something . . . ambiguous" to refute, that should have been controlling this case. Transcript of Oral Argument, *Yankton Sioux Tribe*, 522 U.S. 329 (1998), App. II, 841-842. *See also Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998), App. I, 343. In addition to supporting the arguments in the State Petition, the County respectfully submits that this Court should focus on this fundamental error.

3. Judge Magill noted throughout his dissent in the first court of appeals decision that the presumption of disestablishment should have been controlling in this case from the beginning. The decision of this Court in *Yankton Sioux Tribe* generally confirms the position of Judge Magill.

From these arguments one senses an underlying effort to achieve a result more in harmony with "modern sensibilities" and "a single-minded desire to avoid diminishment at all costs." As a result, once again, as Judge Magill noted in his powerful dissent, the court of appeals has "never acknowledged that the presumption exists." *Id.* at 1459. The fashioning of an unprecedented 37,000 acre noncontiguous reservation under 18 USC §1151(a) in this manner deserves the attention of this Court with reference to conflict it creates with the Supreme Court of South Dakota, especially *Bruguier*. In the process, this Court can assess whether the opinion in *Yankton Sioux Tribe*

has been properly regarded and properly construed in the court of appeals. The miscarriage of justice in this case can be addressed because *Bruguier* adhered to *DeCoteau* and *Yankton Sioux Tribe*. The court of appeals did not.

STATEMENT OF THE CASE

A. *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 890 F.Supp. 878 (D.S.D. 1995); *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 99 F.3d 1439 (8th Cir. 1996); and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), App. I, 321-364.

The dispute over the status of the Reservation commenced when the Yankton Sioux Tribe sued Southern Missouri Recycling and Waste Management District. Southern Missouri acquired property in fee for a municipal solid waste facility on land ceded by the 1894 Act. Southern Missouri sought a state permit for the landfill. After state courts rejected environmental challenges, the Yankton Sioux Tribe filed suit in federal district court. The Tribe sought to enjoin construction of the landfill.

Southern Missouri joined South Dakota as a third party to enable the State to defend its jurisdiction to issue the permit. The court declined to enjoin the landfill project, but ruled that the 1894 Act did not disestablish or diminish the Reservation.

Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., 890 F.Supp. 878, 891 (D.S.D. 1995). Not surprisingly, the United States, as *amicus curiae*, supported the Tribe's claim.

A divided panel of the court of appeals affirmed, relying principally (as had the district court) upon the "saving clause" in the 1894 Act. *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439, 1447-1448 (8th Cir. 1996). The United States again supported the argument of the Tribe. This Court granted certiorari and unanimously reversed. *Yankton Sioux Tribe*, 522 U.S. 329, App. I, 321-364.

The Court based its decision primarily on the cession language of the 1894 statute. *DeCoteau v. District County Court*, 420 U.S. 425 (1975). In particular, the Court found that Articles I and II of the Agreement contained "'cession' and 'sum certain' language [which] is 'precisely suited' to terminating reservation status." *Id.* at 344. The Court cited *DeCoteau* as support for that presumption and continued:

> The terms of the 1894 [Yankton] Act parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau* . . . and, as in *DeCoteau*, the 1894 Act ratified a negotiated agreement supported by a majority of the Tribe.

Id. at 344 (citing 420 U.S. at 445).

The Court rejected the holding of the district court that the Article XVIII saving clause should be

given decisive effect. *Yankton Sioux Tribe*, 522 U.S. at 348. It also rejected the arguments of the United States in support of the Tribe's position.

Earlier passages in the Court's opinion indicated that the Yankton Reservation was disestablished. In the end, however, the Court chose not to determine whether the Reservation was "disestablished . . . altogether." *Id.* at 358. Observing that it "need not determine" that issue to decide the case before it, the Court elected to "limit [its] holding to the narrow question presented." *Id.* The Court did so after noting "conflicting understandings about the status of the reservation" and alluding to the Tribe's ownership of "land in common." *Id.* The Court therefore reversed and remanded the case for further proceedings. *Id.*

B. *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135 (D.S.D. 1998), App. I, 250-320, and *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999), App. I, 199-249, cert. denied, 530 U.S. 1261 (2000).

1. On remand, the Tribe's initial action was consolidated with a declaratory judgment action brought by the Tribe to challenge state criminal jurisdiction over tribal members on all allotted land within the 1858 reservation boundaries. The United States joined as a *party* supporting the Tribe. After an evidentiary hearing, the district court held that the original boundaries of the Reservation still remained intact. *Gaffey*, App. 318-320. Further, the district court found

that all lands within those original boundaries that were not ceded in the 1894 Act, i.e., all allotted lands, and other trust land also remained part of the Reservation (*Gaffey*, App. 318-319), even though roughly 90 percent of the allotted lands had been transferred to non-Indians (230,000 acres). *Yankton Sioux Tribe*, App. I, 336.

2. The court of appeals held that the boundaries of the 1858 reservation were not maintained, reversing the district court in part. *Gaffey*, App. 248. And, the court further held that allotted land which had left Indian ownership was no longer part of the Reservation or "Indian country" of any kind: "we hold that the [reservation] . . . has been further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." *Gaffey*, App. 247. The court of appeals also found that the Reservation had not been "disestablished," stating the "Reservation" consisted of certain former "agency lands" conveyed to the Tribe decades later, and potentially an unknown quantity of other "trust" land. *Gaffey*, App. 249.

The court of appeals left to the "district court on remand to make any necessary findings relative to the status of Indian lands which are held in trust." *Id.* It directed the district court to initially determine which, if any, of the allotted lands then held in trust and other lands taken into trust under various statutes, including the Indian Reorganization Act ("IRA"), were "reservation" under 18 USC §1151(a).

C. *Yankton Sioux Tribe v. Podhradsky*, 529 F.Supp.2d 1040 (D.S.D. 2007), App. I, 122-163; *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. 2009), App. I, 71-121; and *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010), App. I, 1-51.

On this remand, the district court determined that all land allotted to individual Indians before the 1894 Act, which still remained in allotted status, all land taken into trust under the Indian Reorganization Act, and the agency land conveyed to the tribe decades later by virtue of the Act of 1929 – was a "reservation" under 18 USC §1151(a). *Podhradsky*, App. 162-163.

The circuit court issued its first opinion and affirmed the district court, with a minor exception. App. 120-121. In essence, the court of appeals declared that agency lands, allotments which remained in allotted status, and IRA trust lands, have "reservation" status under 18 USC §1151(a). A small quantity of miscellaneous noncontiguous trust lands were alternatively found to constitute dependent Indian communities under 18 USC §1151(b). *Podhradsky*, App. 120. The portion of the district court opinion holding that fee land continuously held in Indian ownership was "reservation" was vacated in that there was no evidence of such lands. *Podhradsky*, App. 115-116, 120-121.

The court of appeals also found all Indian allotments *within the limits* of this isolated noncontiguous "reservation" as trust land allotments would come within the purview of the new definition of Indian

country in 18 USC §1151(a), *even if the lands were subsequently owned in fee by non-Indians*. This holding was not part of the district court's opinion or even used by the Tribe or the United States. The panel, in essence, reached out to give the Tribe even more than it asked for.

Petitions for rehearing and rehearing en banc were filed by the State, the County and Southern Missouri. In response to the Petitions, the court of appeals stated in an Order on Petition for Rehearing that language relating to the allotted lands converted to fee lands after 1948 had not been "incorporated into our judgment." *Podhradsky*, App. 55. As a result, the court of appeals further stated that "footnote 10 and several textual asides" would be deleted to reduce potential misunderstanding. *Podhradsky*, App. 56. An Amended Opinion was issued. This Amended Opinion is the subject of this Petition. *Podhradsky*, App. 52-71.

Subsequent submissions by the State, accepted by the court of appeals, established approximately 6,000 acres of allotted lands that have, in fact, been taken out of allotted status since 1948; these lands are now owned in fee by non-Indians. *See* 2007 Ex. 210. All of this former allotted land is, presumably, permanent "reservation" owned in fee by non-Indians within the

isolated noncontiguous reservation boundaries fashioned by the court of appeals in *Podhradsky*.[3]

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Eighth Circuit Court Of Appeals Directly Conflicts With The Decision Of The South Dakota Supreme Court In *Bruguier v. Class*, 599 N.W.2d 364 (1999), App. I, 164-198.

This Court has used certiorari to resolve reservation status conflicts between state supreme courts and federal courts of appeals before:

> We granted certiorari in the two cases, 417 U.S. 929, to resolve the conflict between the Supreme Court of South Dakota and the Court of Appeals for the Eighth Circuit as to the effect of the 1891 Act on South Dakota's civil and criminal jurisdiction over unallotted lands within the 1867 reservation boundaries.

DeCoteau v. District County Court, 420 U.S. 425, 431 (1975).

> We granted certiorari, 507 U.S. 1028 (1993), to resolve the direct conflict between these

[3] All of the lands on the map in a color darker than the background are thus "reservation" except for a few parcels of tribal lands held in "unrestricted fee" status and shown in blue-grey App I, 395

> decisions of the Tenth Circuit and the Utah Supreme Court. . . .

Hagen v. Utah, 510 U.S. 399, 409 (1994).

> We granted certiorari to resolve a conflict between the decision of the Court of Appeals and a number of decisions of the South Dakota Supreme Court. . . .

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 342 (1998).

A. The decision of the court of appeals is clearly erroneous.

1. This case has been before the Eighth Circuit three times. The first time, adopting the argument of the United States, the district court and the court of appeals failed to give proper weight to the presumption of disestablishment. The district court resurrected the 1858 reservation boundaries (an area of 440,000 acres, 90% owned by non-members, with 2/3 of these non-members residing on small farms and in small towns and cities). *Yankton Sioux Tribe v. Southern Missouri*, 890 F.Supp. 878 (D.S.D. 1995). A divided panel of the court of appeals affirmed. *See Yankton Sioux Tribe v. Southern Missouri*, 99 F.3d 1439 (8th Cir. 1996). This Court granted certiorari to resolve conflicts with the Supreme Court of South Dakota. This Court unanimously reversed the court of appeals. *Yankton Sioux Tribe*, 522 U.S. 329 (1998).

Yankton Sioux Tribe held that the 1858 reservation boundaries were extinguished by the 1894 Act, as

the South Dakota Supreme Court had repeatedly recognized for almost a century. *Id.* at 342. This Court cited the decisions of the South Dakota Supreme Court with approval. *Id.* at 345.

2. The second time, again following the lead of the United States, the district court recognized the 1858 reservation boundaries, despite the opinion of this Court in *Yankton Sioux Tribe*. *Yankton Sioux Tribe*, App. 250. The court of appeals reversed the district court on this point and confirmed that *Yankton Sioux Tribe* had held that the 1858 boundaries were extinguished by the 1894 Act. However, the court of appeals, in derogation of the "very strong presumption" of diminishment/disestablishment (which the court of appeals utterly failed to mention, much less discuss), wrongly resurrected an 18 USC §1151(a) "reservation" of a few hundred acres of ceded noncontiguous agency lands, with 18 USC §1151(a) reservation boundaries around each tract.

The agency lands were unquestionably ceded by Article I to the United States in 1894 ("all unallotted lands" ceded), for eventual use by settlers "when no longer required" for agency purposes. The court of appeals simply ignored the cession. Instead, the court of appeals incorrectly found that the ceded agency lands were an 18 USC §1151(a) reservation by taking one sentence out of context in *Yankton Sioux Tribe* and then focusing on a 1929 Act that eventually allowed the transfer of these lands to the tribe, intermittently, in a series of conveyances decades later. The 1929 Act never mentioned reservation status for these lands.

3. The third time, the district court seized on the fact that the court of appeals had just recognized an agency 18 USC §1151(a) "reservation." *Yankton Sioux Tribe*, App. I, 122. With the encouragement of the United States, the district court took the unprecedented step of declaring all land remaining in trust, primarily isolated noncontiguous tracts, to constitute retroactively an 18 USC §1151(a) "reservation." Never before has 37,000 acres of isolated noncontiguous trust tracts, within *extinguished* reservation boundaries, been declared "within the limits" of a under 18 USC §1151(a).

Following the lead of the United States, the court of appeals again affirmed the district court. App. I, 71. In addition, incredibly, the court of appeals, on its own initiative, also incorrectly added another 6,000 acres of noncontiguous non-Indian fee land because of a misreading of the generic Indian Country statute, 18 USC §1151. (This statute never mentioned the Yankton reservation and was passed in 1948, more than a half century after the Yankton Act).

In the process, no one was given an opportunity to brief the 18 USC §1151(a) reservation status of this post 1948 fee land: not the State, not the County, not the United States, not the Tribe, and most importantly, not the landowners, whose lives and property are impacted ("within the limits" of a "reservation"), without *any* notice whatsoever. County's Petition for

Rehearing and Petition for Rehearing En Banc at 6-12.

This unprecedented holding was the direct result of the district court and the court of appeals continuing to ignore the very strong presumption of diminishment/disestablishment in *Yankton Sioux Tribe*, and instead adopting the arguments of the United States. Moreover, the remand was expressly limited to trust land (as the Order on rehearing subsequently acknowledged ("trust land")). The Order on rehearing removed the post 1948 fee land language from the court of appeals opinion. However, the practical consequences of the Order remain especially troublesome.[4]

4. Another portion of the court of appeals opinion that deserves additional consideration by this Court includes the conflicting holdings in this case, as well as the recent conflict within this circuit. The Amended Opinion of the court of appeals recognizes reservation boundaries around all Indian allotments still held in trust. This decision of the court of appeals

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[4] This Court should review the post 1948 fee land issue for two reasons. As the State has pointed out, the Order deleting the post 1948 fee land footnote is just a short term fix. The generic rationale for including post 1948 fee lands with 18 USC §1151(a) reservation boundaries has not been completely withdrawn from the court of appeals opinion As a result, the text of the court of appeals opinion will undoubtedly be used in future litigation to argue that post 1948 fee lands are within the limits of an 18 USC §1151(a) reservation. Moreover, if the United States repeats its other argument, all 230,000 acres of fee lands, owned primarily by non-Indians, will also be similarly situated. Brief for the United States in Opposition at 8-9, *South Dakota v Yankton Sioux Tribe, Yankton Sioux Tribe v. Gaffey* (Nos. 99-1490 and 99-1683).

conflicts with allotment/fee holding in *Gaffey*, App. I, 199, and conflicts as well with *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, 606 F.3d 895 (8th Cir. 2010), that expressly adopted this aspect of *Gaffey* as the holding in that case.

If the court of appeals is correct that all allotments still held in trust are encompassed by 18 USC §1151(a) reservation boundaries, then *Gaffey* could not have been correct in holding that those same allotments that are now in fee are not within 18 USC §1151(a) reservation boundaries. In other words, 18 USC §1151(a) boundaries do not automatically disappear just because a fee patent is issued. And, 18 USC §1151(a) reservation boundaries are not automatically established because dicta about agency lands is taken out of context and then retroactively parleyed into a 37,000 acre noncontiguous reservation (that promises to include another 6,000 acres, if not another 230,000 acres). In the process, the manner in which the analysis of the district court and the court of appeals avoids any reference that would focus on extinguished 1858 reservation boundaries is also especially noteworthy.

The last time the United States submitted a brief in this Court to address the decision of the court of appeals in *Gaffey*, App. I, 199, the United States maintained that the 230,000 acres of additional fee lands were wrongly excluded from the Yankton Reservation by the decision of the court of appeals. App. I, 199. If the United States is successful in fully reviving this issue at any time, the internal

inconsistency in the decisions in this case and conflicts between the decisions in the court of appeals would certainly be resolved. *However, such a resolution would put thousands of non-Indians and thousands of acres of their fee property back within some reservation boundaries of the Yankton Reservation (a fact that the United States neglects to mention).*

5. Congress has a role in this reservation boundary process that the district court and the court of appeals have not respected. In 1941, even Felix Cohen made clear that Congress did not address reservation boundaries after the passage of the 1894 Yankton Act (which disestablished the 1858 reservation boundaries). *Yankton Sioux Tribe* at 355 n.5. If any allotments were within an 18 USC §1151(a) reservation boundary at any time after the Yankton Act of 1894, *Gaffey*, App. I, 199, was wrongly decided. That conflict persists.

For this reason, the County will rely on the critical, but disregarded, strong presumption of diminishment/disestablishment set forth in *Yankton Sioux Tribe* and confirmed by the South Dakota Supreme Court in *Bruguier*. The court of appeals' primary conclusion that each tract of noncontiguous trust land is encompassed within 18 USC §1151(a) reservation boundaries is not supported by evidence of congressional intent.

By ignoring the very strong presumption of diminishment/disestablishment, the court of appeals in *Gaffey* initially incorrectly designated a few hundred

acres of noncontiguous agency land as an 18 USC §1151(a) reservation ("within the limits" of a "reservation"). On the remand, the district court then incorrectly concluded that all trust lands, including allotments that remained in trust, could also be designated an 18 USC §1151(a) reservation, effective as of the date of the district court decision.[5]

This result should have been rejected in the first instance on the basis of the very strong presumption of diminishment/disestablishment. Further, if the focus would have been on the presumption and extinguished 1858 reservation boundaries, the court of appeals would have demanded compelling evidence of congressional intent to overcome the presumption, to determine that allotments within extinguished reservation boundaries could somehow be transformed into 18 USC §1151(a) Indian reservations. No such evidence was presented. There is no precedent to support this position.

The United States and the Tribe initially argued that *Yankton Sioux Tribe* did not hold that the 1858 Yankton Sioux Reservation boundaries were extinguished. They were successful in the district court, but the court of appeals ultimately decided the boundary question squarely in favor of extinguished

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[5] The district court specifically recognized that the panel in *Gaffey* had previously held that allotted lands which had been transferred to non-Indian fee status before that date were not within the limits of Yankton Sioux Reservation. App. I, 250

1858 boundaries. App. I, 199. After being reversed a second time on this point, the district court finally acquiesced.

Since that time, the district court and the court of appeals have not referenced extinguished reservation boundaries in their analysis. In the process of resurrecting, contrary to binding precedent, a 37,000 acre 18 USC §1151(a) noncontiguous reservation, the extinguished 1858 reservation boundaries are not mentioned in the district court's opinion. In the twenty-three page opinion of the court of appeals, they are only mentioned once, in one paragraph substantiating a historical point to justify the position of the United States on a different issue. This failure of the district court or the court of appeals to focus on extinguished 1858 reservation boundaries is difficult to explain or justify. *This is especially so in light of the fact that in over a century, no decision of the South Dakota Supreme Court or any other court, for that matter, has ever recognized a Yankton reservation with this configuration.*

6. The court of appeals and the parties are not free to slight the disestablishment presumption this Court established in *DeCoteau* and reiterated in *Yankton Sioux Tribe*. In oral argument in *Yankton Sioux Tribe*, this Court repeatedly stressed the controlling nature of this presumption. For example,

> Tribe: The cession and the sum certain language . . . it's just boilerplate . . .
>
> Court: But this Court has said it's nearly irrebuttable.
>
> Court: That's what *Solem* said.
>
> Tribe: No . . . I say . . . the presumption is that the Indians retain the reservation and it's up to the State to rebut
>
> Court: But then you – must . . . mustn't you, if you're taking that position, say, "Court, you were wrong; you should qualify or even overturn your precedent"? . . .
>
> Court: if we're faced with something . . . almost irrebuttable . . . does . . . the part that's uncertain . . . dominate what we have said is a *very strong presumption*?

Transcript of Oral Argument, *Yankton Sioux Tribe*, 522 U.S. 329 (1998) (emphasis added), App. II, 841-842.

This Court in *Yankton Sioux Tribe* relied on the presumption and held that the 1858 reservation boundaries were *disestablished* in their entirety. *See also Yankton Sioux Tribe v. Southern Missouri*, 99 F.3d 1439 (8th Cir. 1996) (J. Magill, dissenting).

The County submits that the presumption applies to the entire 1894 Act and area affected by the 1894 Act. And, moreover, this Court's direction applies to all subsequent proceedings in *Yankton Sioux Tribe*. The failure of the district court and the court of appeals to address or continue to respect this very

strong presumption constitutes reversible error, worthy of the attention of this Court. Compare the repeated acknowledgment of the presumption in the opinion of the South Dakota Supreme Court in *Bruguier*.

In short, we respectfully submit that the court of appeals on remand took a sentence out of context and fashioned an 18 USC §1151(a) agency reservation of a few hundred noncontiguous acres of trust land with 18 USC §1151(a) reservation boundaries around each tract (without briefing) into a 37,000 acre reservation. This holding should be reviewed by this Court. (The United States maintained initially that the holding was "interlocutory" and the Tribe said it was "inconsistent" with all United States Supreme Court decisions.) This area, including the agency lands, is within the scope of the "very strong presumption" of diminishment/disestablishment reiterated in *Yankton Sioux Tribe*.

The Tribe and the United States did not support a 37,000 acre 18 USC §1151(a) noncontiguous reservation with evidence of congressional intent or with any testimony from any of the witnesses. In fact, the Tribe and the United States never argued in support of this 37,000 acre 18 USC §1151(a) noncontiguous reservation, not once, not ever. In 15 years of litigation no one even suggested a reservation like this could exist. In this case, the district court and the court of appeals fashioned a permanent noncontiguous 18 USC §1151(a) reservation, with an 18 USC §1151(a) reservation boundary around each tract, and without precedent in the United States.

In oral argument in *Yankton Sioux Tribe* in this Court, all sides made clear that the record essentially supported two choices – the 1858 reservation or no reservation. Neither choice squares with the novel 37,000 acre 18 USC §1151(a) noncontiguous reservation the district court and the court of appeals refashioned. And the record has not substantively changed.[6]

The first choice – the restoration of the original 1858 reservation boundaries – was unanimously rejected by this Court. The option of the second choice – no reservation – was clearly left open. On remand, the lower courts were invited to make a decision, guided by the almost insurmountable presumption in *DeCoteau* that was reaffirmed in *Yankton Sioux Tribe*. They should have applied the presumption to the 1894 Act and the area it affected. The failure of the federal courts, since the time of the *Yankton Sioux Tribe* decision, to deal seriously with this Court's direction, laid the groundwork for the direct conflict with *Bruguier* that is now before this Court.

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[6] Nothing of substance has been placed in evidence since the remand of this case with reference to congressional intent and the 1894 Act (just generic arguments and documentation related to testimony directed to individual land title records). Reference to anything substantive regarding congressional intent in the findings of fact and conclusions of law in the district court or in the court of appeals decisions to support noncontiguous reservation boundaries is truly a "virtual smokescreen." In addition, the County renews its reliance on the laches arguments in *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U S 197 (2005).

B. The *Bruguier* decision of the South Dakota Supreme Court is clearly correct.

In state court, James Bruguier was convicted of burglary. His crime was committed within the original boundaries of the Yankton Reservation on allotted land to which Indian title had been extinguished. In a habeas corpus petition, Bruguier asserted that the Reservation remained intact and therefore the State lacked jurisdiction. The circuit judge concluded that the Reservation had been disestablished and denied the petition. *Id.*, App. I, 396, 407. The South Dakota Supreme Court, following this Court's lead in *DeCoteau*, *Yankton Sioux Tribe* and its own cases, affirmed, concluding that the 1894 Act disestablished and terminated the reservation. *Bruguier*, App. I, 164.

1. Memorandum Opinion and Order of the Circuit Court for the First Judicial Circuit of the State of South Dakota, County of Charles Mix, *Bruguier v. Class*, June 30, 1998, App. I, 396-406.

The United States is mistaken in claiming that *Bruguier* did not definitively hold that the Yankton Reservation has been disestablished. When *Bruguier* presented in the circuit court, the circuit court framed the issue in that exact manner.

a. Memorandum Opinion and Order of the Circuit Court for the First Judicial Circuit of the State of South Dakota, County of Charles Mix, in *Bruguier v. Class*, June 30, 1998, App. I, 396-406.

Additional consideration of the *Yankton Sioux Tribe* decision convinced the circuit court that the 1894 Act terminated the Reservation. *Id.*, App. I, 402, 405. "[T]he reservation was terminated by the 1894 Act. The allotted lands are no longer a reservation under 18 USC §1151(a)." *Id.*, App. I, 405.

When 18 USC §1151(c) was addressed in the memorandum decision, the circuit court also cited additional state precedent with respect to allotments in areas, like the original Yankton area, where the original reservation boundaries were deemed to be extinguished. *Hollow Horn Bear v. Jameson*, 95 N.W.2d 181 (S.D. 1959). *See also Beardslee v. United States*, 541 F.2d 705 (8th Cir. 1976), discussed in the Petition of Southern Missouri. And the circuit court found that "an allotment to which Indian title has been extinguished; at the time the crime was committed . . . was no longer Indian country under 18 USC §1151(c)." App. I, 406.

b. Findings of Fact and Conclusions of Law of the Circuit Court for the First Judicial Circuit of the State of South Dakota, County of Charles Mix, *Bruguier v. Class*, August 14, 1998, App. I, 407-430.

The record and the findings of fact and conclusions of law in the circuit court are definitive.

Twenty-two pages of findings of fact and conclusions of law in the circuit court make clear that the foundation for the *Bruguier* opinion in the South Dakota Supreme Court was solid and detailed, crystal clear, and not simply based on abstract "reasoning" set forth in the opinion, as the United States claims.

One Finding confirms that even the United States previously acknowledged reservation disestablishment.

> [*N*]*o reservation existed in the area* under 18 USC §1151(a) and that the only "Indian country" remaining was trust allotments, the Indian title to which had not been extinguished, pursuant to 18 USC §1151(c).

Bruguier Finding #23G, App. I, 417 (emphasis added).

The circuit court noted the "absurd" jurisdictional result which would occur if the theory of the habeas petitioner was adopted. Finding #30, App. I, 419-420.

2. *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), App. I, 164-198.

On appeal, in *Bruguier*, App. I, 164-198, the South Dakota Supreme Court was in a solid position to decide the status of the Yankton Sioux Reservation because of the record in the circuit court. Moreover, the South Dakota Supreme Court was very much aware of its role in this litigation.

> "Interpretation of federal law is the proprietary concern of state, as well as federal, courts." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 275 . . . Indeed, the jurisdictional issue here is as *vital* to South Dakota as it is to the Yankton Sioux Tribe and the Federal Government; thus, it is proper for this Court to determine where state jurisdiction lies.[9] [9]For this reason, we have received and reviewed all the briefs and exhibits submitted to the Eighth Circuit Court of Appeals in *Yankton Sioux Tribe v. Gaffey*.

Id., App. I, 174 (emphasis added).

From the beginning, the South Dakota Supreme Court understood what exactly was at stake in the *Bruguier* litigation. With the benefit of the decision in *Yankton Sioux Tribe*, the South Dakota Supreme Court clearly understood the issue. *Id.*, App. I, 177-180. In addition to the record in *Yankton Sioux Tribe*, which had been incorporated by the parties in the same state cases noted in the circuit court in *Bruguier*, the South Dakota Supreme Court also referenced the Joint Appendix briefs from *Gaffey*. *Id.*, App. I, 166.

With this understanding, the South Dakota Supreme Court strictly adhered to the general principles set forth in the *Yankton Sioux Tribe* opinion. In the first instance, the South Dakota Supreme Court explicitly recognized the importance of *DeCoteau* in the *Yankton Sioux Tribe* opinion. *Id.*, App. I, 181, 195-196. The presumption of disestablishment tied to the language of the Yankton Act is detailed at App. I, 181. The Court found the absence of any provision for tribal ownership significant. *Id.*, App. I, 185.

The South Dakota Supreme Court also recognized the importance of the General Allotment Act in the process. The South Dakota Supreme Court further noted that, after the cession, "tribal title" did not involve allotments. *Id.*, App. I, 183. The United States and tribal advocates ordinarily reference later tribal advocacy editions of this Cohen text for support, but at this stage in the *Yankton Sioux Tribe* proceedings, such references are remarkably absent. Federal Indian Law texts undermine the position of the United States and the Yankton Sioux Tribe in this case, as well as the remand opinions of the federal district court and the court of appeals.

The South Dakota Supreme Court also discussed the history of the 1894 Act and every significant argument that had been advanced in opposition to reservation disestablishment since *Yankton Sioux Tribe*. The Court held the reservation was disestablished and that holding squarely conflicts with the holding of the court of appeals.

Had the comprehensive opinion in *Bruguier*, documenting reservation disestablishment, been decided at the time this Court decided *Yankton Sioux Tribe*, the twelve years of remand litigation by the United States and the Yankton Sioux Tribe since that time, one time waiting for years for a hearing even to be scheduled, would have been unnecessary and could not have been maintained.

II. The Decision Of The Court Of Appeals Also Conflicts With Decisions Of This Court And Established Federal Indian Law.

A. The court of appeals decision conflicts with *DeCoteau v. District County Court*, 420 U.S. 425 (1975), other precedent of this Court and other courts.

DeCoteau explains how 18 USC §1151 has traditionally been construed. *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (emphasis added). *DeCoteau* also explains that when an act of Congress has extinguished the reservation boundaries surrounding an area of ceded lands, allotments are not within the limits of a continuing reservation. That, of course, is precisely the situation here, because this Court and the court of appeals have both held that the 1858 Yankton Reservation boundaries have been eliminated. In this situation, allotments continue to be Indian country under 18 USC §1151(c) only if the Indian title has *not* been extinguished (i.e., still in trust, not in fee). This is the holding of *DeCoteau* in no uncertain terms.

> In such a situation, exclusive tribal and federal jurisdiction is limited to the *retained* allotments. 18 USC §1151(c). See *United States v. Pelican*, 232 U.S. 442.

DeCoteau v. District County Court, 420 U.S. 425, 446-447.[7]

In other words, the allotments here are not within the limits of an 18 USC §1151(a) Indian reservation.

In the original Rosebud Reservation, (right across the Missouri River from the Yankton area), where Acts of Congress in the next decade similarly extinguished reservation boundaries, this Court emphasized the point:

> To the extent that members of the Rosebud Tribe are living on allotted land outside of the Reservation, they, too, are on 'Indian country,' within the definition of 18 USC §1151 [more specifically 18 USC §1151(c)], and hence subject to federal provisions and protections.

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 615 n.47 (1977).

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[7] The court of appeals cites *Pelican* and 18 USC §1151(c) at App 1, 26, but attempts to distinguish fact situations. *Pelican* cannot be distinguished. *Pelican* involved an allotment held in trust where the Act extinguished reservation boundaries surrounding the area The area not affected was the diminished Coville Reservation recognized in *Seymour v Superintendent*, 368 U.S. 351 (1962). *Pelican* was codified as "authority" to include Indian trust allotments in 18 USC §1151(c) The decision of the court of appeals conflicts with all of this

The fact that some 18 USC §1151(a) reservations continued to exist in other areas of the Rosebud Reservation was not probative of continuing reservation status for allotted lands within the extinguished area; indeed, the point of *Pelican* and *Rosebud* is that such lands are not reservation. Allotted lands within an extinguished area are classified as "allotted lands, the Indian titles to which have not been extinguished" under 18 USC §1151(c), under *Pelican* (which prompted 18 USC §1151(c)), and *Rosebud*, which implements *Pelican* and §1151(c). (*See also Beardslee v. United States*, 387 F.2d 280 (8th Cir. 1967) and *Cook v. Parkinson*, 525 F.2d 120 (8th Cir. 1975).)

In other words, *Pelican*, 232 U.S. at 449 (as *DeCoteau* and *Rosebud* confirm), establishes that when reservation boundaries around an area are extinguished, the allotted lands remain "Indian country," but only "during the trust period." The decision of the court of appeals thus undermines the long-established meaning and interpretation of 18 USC §1151(c). *Beardslee v. United States*, 387 F.2d 280, 284, 287 (8th Cir. 1967) (Blackmun, J.) (Rosebud allotted lands within extinguished boundaries retain "Indian country" status, but such status is "temporary and lasts only until the Indian title is extinguished.")

III. The Shifting Arguments Of The United States Are Without Merit.

A fair reading of *Seymour v. Superintendent*, 368 U.S. 351 (1962), *Mattz v. Arnett*, 412 U.S. 481 (1973),

DeCoteau v. District County Court, 420 U.S. 425 (1975), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), *Solem v. Bartlett*, 465 U.S. 463 (1984), *Hagen v. Utah*, 510 U.S. 399 (1994) and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), undermines the continuing reservation status of any Yankton Reservation recognized by the court of appeals. The same cases confirm that the South Dakota Supreme Court in *Bruguier* was clearly correct in holding that the Yankton Reservation was disestablished.

In *Yankton Sioux Tribe*, the County reviewed the main arguments presented and rejected in each reservation boundary case decided by this Court, as well as the historic perspective at that time. Br. of Charles Mix County, South Dakota in Supp. of Pet'r, *Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581), App. II, 460. To complete the perspective, the County also reproduced every brief and oral argument that the United States has submitted in these cases. App. II, 504-830.

The arguments of the United States are especially noteworthy. The United States, as *amicus curiae*, submitted an earlier Brief in this case acknowledging a "strong interest in protecting the integrity of reservation boundaries." Br. for the United States, App. II, 722. What the United States has never acknowledged is the repeated rejection of those arguments by this Court and the manner in which concessions and conflicts are simply ignored by the United States.

This has always been a problem, with the United States in reservation status cases. But it is especially troublesome, when, as in this case, the concession and conflicts are in the *same* case. *See New Hampshire v. Maine*, 532 U.S. 742 (2001).

The United States has never failed to advocate the resurrection of reservation boundaries, presumably because of this perceived obligation to always support the tribal position. The shifting, but very sophisticated, arguments of the United States (for the most part repeatedly rejected by this Court) have mainly served to perpetuate the confusion and conflict in this area of federal Indian law, fueling prospects of additional litigation. This case is a perfect example.

In 1975 in *DeCoteau*, 420 U.S. 425 (1975), the United States argued against cession disestablishment because of the General Allotment Act and lost. App. II, 537, 769. After the decision of this Court in *DeCoteau*, even the United States repeatedly acknowledged that Congress intended cession statutes such as the Yankton cession to disestablish reservation areas. In *Hagen*, the United States acknowledged that it would be "rather difficult" to support any other construction. App. II, 799.

Moreover, the specific cession concessions of the United States regarding the disestablishment of the 1858 Yankton Sioux reservation are significant. For example, in 1984, the United States formally submitted this Yankton reservation disestablishment

concession in the Eighth Circuit Court of Appeals. *United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985) *rev'd in part by, United States v. Dion*, 476 U.S. 734 (1986).

In other litigation pending at the same time, also dealing with the 1858 Yankton Sioux Reservation, the United States acknowledged that this Court's decision in *DeCoteau* involved "a similar and contemporaneous cession agreement" with "the same language" and "purpose." Br. for the United States, *Yankton Sioux Tribe v. South Dakota*, 796 F.2d 241 (8th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1986). But in *Yankton Sioux Tribe*, the United States attempted to circumvent the holding in *DeCoteau* regarding this type of cession. In the process, the United States and the court of appeals fashioned a reservation in direct conflict with the holding in *Bruguier*.

Past experience suggests that the United States will support whatever argument the Yankton Sioux Tribe chooses to advance in this Court. One other thing is fairly certain. The United States will not honor the position advanced by the Office of the Solicitor General in this Court in *Yankton Sioux Tribe* (i.e. that disestablishment was inevitable if the argument of the United States regarding Article XVIII was rejected and the 1858 Yankton boundaries were not recognized by this Court, because *nothing* in the Yankton documentation supported any other conclusion). Briefs for the United States, App. I, 722, 808. App. I, 808-859. This Court in *Yankton Sioux*

Tribe rejected the argument of the United States and the 1858 reservation boundaries were not recognized.

This Court found that:

> Moreover, the Government's contention . . . contradicts the common understanding of the time. . . . Rather than read the saving clause in a manner that eviscerates the agreement in which it appears, we give it a "sensible construction" that avoids this "absurd conclusion." . . .

Yankton Sioux Tribe, App. I, 345-346.

Nevertheless, within days of the *Yankton Sioux Tribe* decision, the United States reneged on the inevitable disestablishment argument it presented to this Court, even before the case was remanded to the district court. Since then, the United States has adopted several conflicting arguments to continue supporting the position of the Yankton Sioux Tribe that the 1858 reservation boundaries be resurrected or, at least some type of reservation be recognized.

The "litigating position" of the United States in this type of case should be subject to heightened scrutiny. *South Dakota v. Bourland*, 508 U.S. 679, 697 (1993). *See also Washington v. Yakima Indian Nation*, 439 U.S. 463, 477-478 n.20 (1979) ("[United States] recently changed its position diametrically"). The rejection of the position of the United States by this Court in *Yankton Sioux Tribe* counsels there is

no basis to give any special credence to the position of the United States in cases of this nature.

CONCLUSION

Petitioner Charles Mix County respectfully requests the Court to grant its Petition.

Respectfully submitted,

PAMELA HEIN
Charles Mix County
State's Attorney
P.O. Box 370
Lake Andes, SD 57356
(605) 487-7441

SCOTT GREGORY KNUDSON
BRIGGS AND MORGAN, P.A.
2200 IDS Center
Minneapolis, MN 55402
(612) 977-8400

TOM D. TOBIN
Counsel of Record
P.O. Box 730
422 Main Street
Winner, SD 57580
(605) 842-2500
tobinlaw@gwtc.net

Attorneys for County Petitioners

Supreme Court, U.S.
FILED

No. (2) 10-932

JAN 18 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

PAM HEIN, STATE'S ATTORNEY OF CHARLES MIX COUNTY; KEITH MUSHITZ, MEMBER OF THE CHARLES MIX COUNTY, SOUTH DAKOTA, COUNTY COMMISSION; NEIL VONESCHEN, MEMBER OF THE CHARLES MIX COUNTY, SOUTH DAKOTA, COUNTY COMMISSION; JACK SOULEK, MEMBER OF THE CHARLES MIX COUNTY, SOUTH DAKOTA, COUNTY COMMISSION,

Petitioners,

v.

YANKTON SIOUX TRIBE AND UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI, VOLUME I

PAMELA HEIN
Charles Mix County
State's Attorney
P.O. Box 370
Lake Andes, SD 57356
(605) 487-7441

SCOTT GREGORY KNUDSON
BRIGGS AND MORGAN, P.A.
2200 IDS Center
Minneapolis, MN 55402
(612) 977-8400

TOM D. TOBIN
Counsel of Record
P.O. Box 730
422 Main Street
Winner, SD 57580
(605) 842-2500
tobinlaw@gwtc.net

Attorneys for County Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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606 F.3d 994

United States Court of Appeals,
Eighth Circuit.

YANKTON SIOUX TRIBE, and its individual members, Plaintiffs-Appellees/Cross-Appellants,

United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe, Intervenor Plaintiff-Appellee,

v.

Scott J. PODHRADSKY, State's Attorney of Charles Mix County; C. Red Allen, member of the Charles Mix, South Dakota, County Commission; Keith Mushitz, member of the Charles Mix, South Dakota, County Commission; Sharon Drapeau, member of the Charles Mix, South Dakota, County Commission; M. Michael Rounds, Governor of South Dakota; Lawrence E. Long, Attorney General of South Dakota, Defendants-Appellants/Cross-Appellees,

Southern Missouri Waste Management District, Interested Party.

Rosebud Sioux Tribe, Amicus on behalf of Appellees.

Nos. 08-1441, 08-1488.

Submitted: May 5, 2010.
Filed: May 6, 2010.

Pamela H. Hein, Dee Mulder, Lake Andes, SD, Tom D. Tobin, Winner, SD, for Charles Mix County.

John P. Guhin, Deputy Attorney General, Meghan N. Dilges, Asst. Attorney General, Pierre, SD, for State of South Dakota.

Mark E. Salter, AUSA, Sioux Falls, SD, for United States of America.

Rebecca L. Kidder, Charles Abourezk, Rapid City, SD, for Yankton Sioux Tribe.

Eric John Antoine, Rosebud, SD, Terry L. Pechota, Rapid City, SD, on the amicus briefs, for Rosebud Sioux Tribe.

Timothy R. Whalen, on the amicus brief, Lake Andes, SD, for The Frank Soukup Family Limited Partnership, Mark Van Duysen, and Dan Cimpl.

Kenneth Wayne Cotton, on the amicus brief, Wagner, SD, for Southern Missouri Waste Management District.

Scott J. Podhradsky, on the amicus brief, Wagner, SD, for Wagner Community School District No. 11-4.

Michael James Whalen, on the amicus brief, Rapid City, SD, for Charles Mix Electric Association.

Sandy Steffen, Gregory, SD, Susan W. Phalke, Winner, SD, Michael B. Strain, White River, SD, Gay K. Tollefson, Martin, SD, on the amicus briefs, for Tripp County, Gregory County, Mellette County and Bennett County, SD.

Craig Parkhurst, on the amicus brief, Armour, SD, for Cities Dante, Geddes, Lake Andes, Pickstown Platte, Rivinia and Wagner.

Before MURPHY, MELLOY, and SHEPHERD, Circuit Judges.

AMENDED OPINION

MURPHY, Circuit Judge.

In this action the Yankton Sioux Tribe (Tribe) and its members sought declaratory and injunctive relief against officials of Charles Mix County[1] and the State of South Dakota[2] in respect to the boundaries of the Yankton Sioux Reservation. In an earlier stage of the case we held that the Tribe's 1894 cession of certain land to the United States had diminished, rather than disestablished, the reservation and that some land retained reservation status. *Yankton Sioux Tribe v. Gaffey (Gaffey II)*, 188 F.3d 1010 (8th Cir.1999), *cert. denied*, 530 U.S. 1261, 120 S.Ct. 2717, 147 L.Ed.2d 982 (2000). We remanded to the district court for further development of the record and for "findings relative to the status of Indian lands which are held in trust." *Gaffey II*, 188 F.3d at 1030.

An earlier action had been filed by the Tribe against the Southern Missouri Waste Management District (Waste District), seeking a declaration that the 1858 boundaries of the reservation remained intact and that therefore a particular site at issue was subject to federal environmental regulation.

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[1] Scott Podhradsky, state's attorney for Charles Mix County, and individual members of the county commission. During the course of this consolidated litigation, Podhradsky replaced Matt Gaffey as state's attorney and first named defendant.

[2] Governor Michael Rounds and Attorney General Lawrence Long.

After the Tribe prevailed in the district court and on appeal, *Yankton Sioux Tribe v. S. Mo. Waste Mgmt. Dist.*, 890 F.Supp. 878 (D.S.D.1995), *aff'd*, 99 F.3d 1439 (8th Cir.1996), the Supreme Court reversed. In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), the Supreme Court held that the Yankton Sioux Reservation had been diminished by the Tribe's cession of certain lands to the United States in 1894 and that the parcel at issue in the Tribe's dispute with the Waste District was not reservation land.[3] The Court remanded for determination of the larger question of whether the Yankton Sioux Reservation had been disestablished or diminished.

On remand the original case was consolidated with this separate action against the county and state officials in which the Tribe seeks a declaratory judgment that all land not ceded to the United States in 1894 remains part of the Yankton Sioux Reservation under the jurisdiction of the Tribe and the federal government. The United States intervened on its own behalf and for the benefit of the Tribe. The district court ruled in favor of the Tribe, concluding that the reservation had not been disestablished but consisted of all land not ceded in 1894 as well as certain

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[3] The Tribe has never dismissed its action against the Waste District which remains an inactive interested party, not having filed a notice of appeal. The district court observed that district representatives were present during the *Podhradsky* trial but had not played an active role after October 2004

reserved "agency trust lands." *Yankton Sioux Tribe v. Gaffey (Gaffey I)*, 14 F.Supp.2d 1135 (D.S.D.1998). The defendants appealed, and we affirmed in part, reversed in part, and remanded for further proceedings, *Gaffey II*, 188 F.3d at 1030-31, holding that the reservation had been diminished rather than disestablished and that it included at least the agency trust lands, but reversing and remanding in other respects.

Now before our court are appeals filed by both sides from the judgment issued by the district court after additional proceedings on remand, *Yankton Sioux Tribe v. Podhradsky*, 529 F.Supp.2d 1040 (D.S.D.2007). The district court ruled that some 37,600 acres of trust land remained part of the reservation and that land continuously owned in fee by individual Indians also qualified as reservation. The county and state defendants appeal, and the Tribe, supported by the intervening United States, cross appeals. We affirm in part and vacate in part.

I.

The original boundaries of the Yankton Sioux Reservation were created by treaty between the Tribe and the United States on April 19, 1858, 11 Stat. 743 (1858 Treaty). In that treaty, the Tribe ceded more than 11,000,000 acres of land to the United States

and reserved to itself approximately 430,400[4] acres in what is now Charles Mix County, South Dakota. The United States guaranteed to the Tribe "the quiet and peaceable possession of the said tract," 11 Stat. at 744, and agreed that, with certain exceptions, "[n]o white person . . . shall be permitted to reside or make any settlement upon any part of the tract herein reserved for said Indians," 11 Stat. at 747. The subsequent history of the Tribe and its reservation reflects the changing policies of the federal government over the succeeding years.

In the first half of the nineteenth century, federal Indian policy focused on removing tribes from the eastern half of the country and relocating them on western lands, but by the time of the 1858 Treaty, "federal policy had shifted fully from removal to concentration on fixed reservations." *Cohen's Handbook of Federal Indian Law* § 1.03[6][a], at 65 (2005 ed.) (*Cohen*). These reservations were "envisioned as schools for civilization, in which Indians under the control of the agent would be groomed for assimilation." *Id.*

As the westward migration of white settlers accelerated following the Civil War, pressure grew to

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[4] Although the 1858 Treaty refers to 400,000 acres, a later survey concluded the reservation contained 430,405 acres at the time of the treaty *See* Letter from the Commissioner of Indian Affairs to the Secretary of the Interior (Dec 9, 1893), *reprinted in* S. Exec Doc No 27, 53d Cong., 2d Sess , 1, 5 (1894) (Commissioner's Letter)

open Indian reservations for agricultural and resource development by the newcomers. Supporters of Indian assimilation argued that as more Indians adopted white customs and agricultural practices, their need for large tracts of reservation land would diminish, freeing vast areas for white settlement and development. This approach was formalized in the General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388 (repealed in part by Pub.L. No. 106-462 § 106, 114 Stat. 1991, 2007 (2000)).

Under the Dawes Act, the executive branch was authorized to divide portions of Indian reservations into personally assigned allotments to be distributed to individual tribal members. *Id.* § 1, 24 Stat. at 388. The Secretary of the Interior was directed to issue patents, under which the United States would hold title to the allotments in trust for twenty five years "for the sole use and benefit of the Indian to whom such allotment shall have been made." *Id.* § 5, 24 Stat. at 389. At the end of the trust period, allottees would take fee simple ownership of their individual plots, free of any restrictions against sale or alienation to non Indians. *Id.* Furthermore, once a reservation had been divided into allotments, the government was empowered to negotiate with the tribes for the purchase of unallotted surplus land and to open such areas to white settlement. *Id.*

The allotment policy in general and the Dawes Act in particular were intended to hasten the demise of the reservation system and to encourage Indian assimilation into the white system of private property

ownership. "Within a generation or two, it was thought, the tribes would dissolve, their reservations would disappear, and individual Indians would be absorbed into the larger community of white settlers." *Yankton Sioux Tribe*, 522 U.S. at 335, 118 S.Ct. 789.

Acting under the authority of the Dawes Act, federal agents allocated to tribal members individual allotments comprising 167,325 acres of the then 430,405 acre Yankton Sioux Reservation. Another 95,000 acres were subsequently allotted to tribal members under the Act of February 28, 1891, 26 Stat. 794 (1891 Act). These tribal allotments, totaling approximately 262,300 acres, were not contiguous parcels of land. Rather, the individual allotments were scattered across the reservation and interspersed with approximately 168,000 acres of unallotted surplus land. Commissioner's Letter at 5.

In 1892 a three member Yankton Indian Commission, which represented the Secretary of the Interior, traveled to the reservation to discuss the federal government's interest in acquiring the Tribe's surplus land. After lengthy negotiations, the Tribe agreed to sell all of the unallotted acreage to the United States for $600,000. The ceded land was then to be opened to white settlement, with the exception of roughly 1,000 acres specifically reserved for use by the United States for "agency, schools, and other purposes." Act of August 15, 1894, ch. 290, 28 Stat. 286, 316 (1894 Act). These set aside agency reserve lands were expected to be opened for white ownership at such time as they were no longer needed for the

Tribe's support. *Id.* The Supreme Court has commented that the set aside of these agency lands is evidence that Congress envisioned an ongoing reservation despite the sale of the surplus lands. *Yankton Sioux Tribe,* 522 U.S. at 350, 118 S.Ct. 789.

Congress ratified the cession agreement by statute in the 1894 Act, and in May 1895 President Grover Cleveland issued a proclamation opening the ceded land to white settlement. In *Yankton Sioux Tribe* the Supreme Court ruled that the land ceded to the United States under the 1894 Act was thus no longer part of the Yankton Sioux Reservation but fully subject to the jurisdiction of South Dakota. 522 U.S. at 358, 118 S.Ct. 354. By the end of the nineteenth century federal Indian policy had therefore reduced the Tribe's land holdings from a sizeable communal reservation to a checkerboard of individual allotments intermingled with white homesteads.

Subsequently Congress passed the Act of May 8, 1906, ch. 2348, 34 Stat. 182 (Burke Act), amending § 6 of the Dawes Act. The Burke Act gave the Secretary of the Interior the discretion to remove allotted land from trust status and to issue fee simple patents, either upon the death of an Indian allottee or upon a finding that an allottee was "competent and capable of managing his or her affairs." 34 Stat. at 183. Upon issuance of fee simple patents, such Indian owned land would then be freely alienable to white settlers. As a result of fee patents issued under the Burke Act, tribal allotments began passing into white hands well before the expiration of the original twenty

five year trust period set by the Dawes Act. By 1930, tribal members held only 43,358 acres of land out of the more than 262,300 acres originally carved into Indian allotments.[5] Herbert T. Hoover, A Yankton Sioux Tribal Land History 5 (1995) (unpublished manuscript).

In 1916, recognizing the rapid erosion of the Tribe's allotted lands, President Woodrow Wilson issued an executive order extending by ten years the trust period on all but approximately 150 of the parcels still held in trust on the Yankton Sioux Reservation. Exec. Order No. 2363, Apr. 20, 1916. The trust periods were again extended in 1926 and 1929. Exec. Order No. 4406, Mar. 30, 1926; Exec. Order No. 5173, Aug. 9, 1929. In 1929 Congress also reconsidered the disposition of the roughly 1,000 acres of land which had been set aside for "agency, schools, or other purposes." Although the 1894 Act originally envisioned that these lands would be opened to white settlement once they had served their intended

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[5] The Tribe argues that the Burke Act did not apply to allotments made on the Yankton Sioux Reservation and that therefore some 300 "forced fee patents" issued under it should be considered null and void The Tribe did not raise this argument until after the case was before the district court for the third time As that court noted, "[t]here is . . a limit as to what should be undertaken to determine reservation boundary issues that were not raised or addressed by this Court nor the superior courts This issue [is] beyond the scope of this litigation. . . ." *Yankton Sioux Tribe v Gaffey*, No CIV 98-4042, 2006 WL 3703274, at *3 (D S.D Dec. 13, 2006) (order identifying the issues to be considered on remand). We agree

purposes, Congress decided instead to return them to the Tribe and specifically precluded any allotments on these parcels. Act of February 13, 1929, ch. 183, 45 Stat. 1167 (1929 Act).

During this period, the consequences of the allotment and assimilation policies became acutely obvious. The process of allotment and the liberalized issuance of fee patents under the Burke Act left many Indians landless and reduced once coherent communities to jurisdictional checkerboards, as is currently reflected in respect to the Yankton Sioux Reservation. *Cohen,* § 1.04, at 78. Moreover, "[t]he process of transforming Indian culture into white culture proved more difficult than placing an Indian name on allotted land deeds. . . . [T]he cultural resilience of the American Indian amazed even the most dedicated reformer." *Id.* at 80.

By the early twentieth century, the forces behind allotment and assimilation were nearly exhausted, and federal policy was reoriented towards "new protections for Indian rights, support for federally defined tribalism, and encouragement of historical and anthropological concerns such as arts, crafts, native rituals, tourism, and traditional economic systems." *Id.* § 1.05, at 84. In time this new attitude led to the Indian Reorganization Act of 1934 (IRA), ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. § 461 *et seq.*).

The IRA reflected a fundamental change in federal Indian policy. It prohibited further allotment

of Indian lands and indefinitely extended the trust periods for outstanding allotments. The Act also authorized the Secretary of the Interior to acquire additional lands in trust – both on and off reservation – and either to proclaim these lands part of a new reservation or to add them to an existing one. Since the passage of the IRA, the government has taken almost 6,500 acres into trust for the benefit of the Yankton Sioux Tribe.

This tangled history, along with the inconsistent and sometimes contradictory policies pursued by the national government, has produced a confusing patchwork of land holdings and jurisdictional claims within the original 1858 boundaries of the reservation. For ease of exposition, we have identified six general categories of land.

> (1) *Allotted Trust Lands:* lands allotted to members of the Tribe which have been continuously held in trust for the benefit of the Tribe or its members. This category includes allotments which were later transferred from individual to tribal control, so long as the trust status was maintained. The district court found 30,051.66 acres of land fit this description.[6]
>
> (2) *Agency Trust Lands:* lands ceded to the United States in the 1894 Act but reserved for

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[6] In *Yankton Sioux Tribe* the Supreme Court mentioned 30,000 acres held in trust for individual Indians and 6,000 acres of "tribal lands." 522 U.S. at 796, 118 S.Ct. 948.

"agency, schools, and other purposes" which then were returned to the Tribe according to the 1929 Act. The district court identified 913.83 acres of land within this category. We held this category of land to be part of the diminished Yankton Sioux Reservation in *Gaffey II*. 188 F.3d at 1030.

(3) *IRA Trust Lands:* lands acquired by the United States in trust for the benefit of the Tribe pursuant to the IRA. The district court identified 6,444.47 acres of such land.

(4) *Miscellaneous Trust Lands:* lands acquired by the United States in trust for the benefit of the Tribe other than pursuant to the IRA. Approximately 174.57 acres fit within this category.

(5) *Indian Fee Lands:* allotted lands later transferred in fee to individual Indians and which have never passed out of Indian ownership. The record does not identify lands which may fit this description.

(6) *Non Indian Fee Lands:* lands ceded to the United States in the 1894 Act and subsequently opened to white settlement which have not been reacquired in trust; and nonceded lands originally allotted to tribal members but later transferred in fee to non Indians and never reacquired in trust.

Of these six categories, the first four may be generically referred to as "trust lands" and the last two as "fee lands."

The trust lands are spread across the site of the original 1858 reservation in a complex checkerboard pattern, intermingled with lands long since occupied by white homesteaders. As a result the Yankton Sioux trust lands are not neatly contained within a single continuous boundary. The defendants urge that this characteristic shows the reservation has ceased to exist, but they cite no authority which requires that a reservation consist of compact, contiguous lands. While the fractured configuration of the Yankton Sioux Reservation may not seem ideal to various parties, it is a historic artifact resulting from shifting federal policy. There was evidence at trial that the parties have long experience in dealing with this historical reality. For example, defendant Scott Podhradsky, state's attorney for Charles Mix County, testified that local and federal officials have developed a respectful and productive working relationship despite the complex jurisdictional boundaries.

In short, the 11,000,000 acre domain once assigned to the Tribe was successively fragmented and dramatically reduced in size: first to roughly 430,400 acres in 1858 and then to 262,300 acres in 1894. The issues now before us include the status of some 37,600 acres held in trust. Whatever the size of the remaining reservation lands, there is evidence in the record that they have continuing relevance and importance to the Yankton Sioux Tribe as a touchstone linking tribal members with each other and with their common culture, history, and heritage.

II.

In September 1994 the Yankton Sioux Tribe commenced its civil action against the Waste District seeking to prove that the site of a proposed landfill was in fact located on the Yankton Sioux Reservation and was therefore subject to federal environmental regulations. The Waste District filed a third party complaint and added the State of South Dakota as a party. In 1995 the district court decided that the original reservation boundaries as established by the 1858 Treaty remained in force. *Yankton Sioux Tribe v. S. Mo. Waste Mgmt. Dist.*, 890 F.Supp. 878 (D.S.D.1995), *aff'd*, 99 F.3d 1439 (8th Cir.1996).

The Supreme Court reversed, holding that all lands which had been ceded to the United States pursuant to the 1894 Act had thereby lost reservation status and were returned to the public domain. The Court specifically reserved the question of whether the 1894 Act had disestablished the entire reservation or whether a diminished reservation continued to exist within the nonceded lands. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998). It also observed that the Act's special treatment of the reserved agency trust lands was an indication that Congress intended some sort of continuing reservation. *Id.* at 350, 118 S.Ct. 789. The case was then returned to our court, and we remanded to the district court for further proceedings. *Yankton Sioux Tribe v. S. Mo. Waste Mgmt. Dist.*, 141 F.3d 798, 799 (1998).

On remand the district court consolidated the original case against the Waste District with this separate civil action brought by the Tribe against various state and county officials seeking injunctive and declaratory relief. The Tribe asserted that the Yankton Sioux Reservation had been diminished only by those lands ceded in the 1894 Act and that all other lands within the 1858 boundaries – that is, the 262,300 acres comprising the original allotted trust lands – remained part of the reservation regardless of their later disposition. The Tribe argued that such lands were therefore within the jurisdiction of the Tribe and the federal government. The United States successfully intervened on behalf of the Tribe. After considering the parties' arguments, the district court held in favor of the Tribe and the government and declared that the Yankton Sioux Reservation continued to exist and consisted of the agency trust lands in addition to all other lands which had not been ceded in the 1894 Act. *Yankton Sioux Tribe v. Gaffey (Gaffey I)*, 14 F.Supp.2d 1135 (D.S.D.-1998).

The defendants appealed, and this court affirmed in part, reversed in part, and remanded. *Yankton Sioux Tribe v. Gaffey (Gaffey II)*, 188 F.3d 1010 (8th Cir.1999), *cert. denied*, 530 U.S. 1261, 120 S.Ct. 2717, 147 L.Ed.2d 982 (2000). After examining the arguments of the parties and the record they had made, we held that the Yankton Sioux Reservation had not been disestablished by the cession of surplus lands or by other means. We also held that the reservation consisted of, at a bare minimum, those lands reserved

by the 1894 Act to the United States for "agency, schools, and other purposes" and which had been subsequently returned to the Tribe by the 1929 Act. We reversed the judgment of the district court that all of the originally allotted lands continued to be part of the reservation. We concluded that those allotments which had passed out of Indian hands and into white ownership had ceased to be part of the reservation. Since the existing record was inadequate to determine the status of either the remaining trust lands or any fee lands owned by individual Indians, a remand was necessary. The remaining trust lands were comprised of allotments continuously held in trust for the Tribe or its members, as well as lands later taken into trust by the United States for the benefit of the Tribe including those acquired pursuant to the 1934 Indian Reorganization Act.

In sum, in *Gaffey II* we held that the Yankton Sioux Reservation had not been disestablished but diminished, and that it consisted of at least the agency trust lands but did not include lands which had passed into white ownership. We remanded to the district court with instructions to develop the record and make findings relevant to the status of the remaining categories of land. All parties petitioned for en banc review, which was denied. *Yankton Sioux Tribe v. Gaffey*, No. 98-3894 (8th Cir. Dec. 8, 1999) (order denying petition for rehearing with petition for rehearing en banc). The Supreme Court denied certiorari. *Yankton Sioux Tribe v. Gaffey*, 530 U.S. 1261, 120 S.Ct. 2717, 147 L.Ed.2d 982 (2000).

On remand the parties conducted additional discovery, after which the district court conducted a two day trial and considered a voluminous set of historical documents and government reports, along with numerous spreadsheets and area maps relevant to the various land holdings in dispute. The district court then made findings of fact and conclusions of law, settling all the contested issues about reservation status in favor of the Tribe. The district court began by recognizing our *Gaffey II* holding, including that the agency trust lands which had been returned to the Tribe were part of a diminished Yankton Sioux Reservation. The district court then determined that all outstanding allotments which had maintained their trust status – whether for the benefit of the Tribe in common or for individual members – continued to be part of the reservation. Next, the district court held that all lands taken into trust pursuant to the IRA were reservation land; the district court determined alternatively that this category of trust lands is at a minimum "de facto" reservation or a "dependent Indian community" subject to federal and tribal jurisdiction. Finally, the district court ruled that former allotments which were now owned in fee by tribal members were part of the reservation so long as such lands had never passed out of Indian ownership.

The district court also made several ancillary rulings. In particular, it held that, notwithstanding the Tribe's contrary assertion, a 1927 congressional enactment had not frozen the boundaries of the

reservation. It further held that the 1934 IRA had frozen the boundaries, but that a subsequent 1948 measure ended that freeze. The district court also rejected a claim by the defendants that 3,201 acres of land allegedly taken into trust by the United States for the benefit of the Tribe were never formally accepted into trust status and therefore cannot be considered trust lands or reservation. The district court held that such a challenge to the trust status of the lands was barred by the United States' sovereign immunity and that such immunity had not been waived by the Quiet Title Act, 28 U.S.C. § 2409a.

The district court's final judgment decreed that the agency trust lands, outstanding allotments, IRA trust lands, and Indian owned fee lands continuously held in Indian hands qualified as reservation. It denied all other claims asserted by the parties. The final judgment did not incorporate the district court's alternative holdings, and it is from that judgment that appellants and cross appellants have taken their appeals.

On their appeal, the defendants challenge the district court's conclusions that the various trust lands are part of the Yankton Sioux Reservation, either formally or informally, or that such lands support a dependent Indian community. They also persist in asking us to reconsider *Gaffey II* and continue to argue, contrary to that decision, that the reservation has been completely disestablished and that even the agency trust lands lack reservation status. Finally, they contend that the district court

erred in not considering their claim that the United States had failed formally to accept certain lands into trust. On its cross appeal, the Tribe objects to the district court ruling that the reservation boundaries are not frozen. The United States asks us to affirm the district court decision in its entirety. We review the findings of fact made by the district court in a bench trial for clear error and review de novo its legal conclusions and mixed questions of law and fact. *Eckert v. Titan Tire Corp.*, 514 F.3d 801, 804 (8th Cir.2008).

III.

Before we turn to review of the district court's findings and conclusions on remand, we must take up several preliminary issues raised there and argued again on appeal. First among these is the defendants' continuing challenge to our holding in *Gaffey II* that the Yankton Sioux Reservation had not been disestablished.

Gaffey II squarely held that the Yankton Sioux Reservation was never disestablished and that, although diminished, the reservation continues to exist and at a minimum consists of the agency trust lands reserved to the United States for "agency, schools, and other purposes" and later returned to the Tribe. These holdings were part of the law of the case remanded to the district court. The law of the case doctrine means "that when a court decides upon a rule of law, that decision should continue to govern

the same issues in subsequent stages in the same case." *Gander Mountain Co. v. Cabela's, Inc.*, 540 F.3d 827, 830 (8th Cir.2008) (internal quotation marks omitted). The appellants have presented no persuasive reasons to revisit our holding in *Gaffey II*.

We observed in *Gaffey II* that the 1894 Act reserved the agency trust lands to the federal government for the purpose of providing "aid and education to tribal members so long as they were needed." *Gaffey II*, 188 F.3d at 1029. That provision is "strong evidence that a reservation was expected to remain in existence." *Id.* at 1027. Indeed, the Supreme Court appeared to reach a similar conclusion in *Yankton Sioux Tribe*, commenting that it would be "'difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation.'" *Yankton Sioux Tribe*, 522 U.S. at 350, 118 S.Ct. 789 (quoting *Solem v. Bartlett*, 465 U.S. 463, 474, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984)). Based on the language of the 1894 Act and the negotiations between the Tribe and federal officials preceding it, we held in *Gaffey II* that these lands were part of an ongoing reservation. 188 F.3d at 1030.

Under the law of the case doctrine, "a decision in a prior appeal is followed in later proceedings unless a party introduces substantially different evidence, or the prior decision is clearly erroneous and works a manifest injustice." *United States v. Bartsh*, 69 F.3d 864, 866 (8th Cir.1995) (internal quotation marks

omitted). The defendants have not met either of these conditions.

The defendants' new evidence introduced at the court trial on remand does not undermine our analysis in *Gaffey II*. They rely principally on testimony by a former official of the Bureau of Indian Affairs and an agent of the Federal Bureau of Investigation, both of whom said that they personally would exercise jurisdiction over agency trust land only so long as it was held in trust. Because these witnesses based their jurisdiction on the land's trust status as opposed to any reservation status, the defendants argue their testimony undermines the concept of a continuing reservation. According to the trial transcript, these witnesses were never asked whether the agency trust land also qualifies as reservation land, and it is far from clear that their statements reflect a considered jurisdictional distinction between reservation land and various trust properties. More importantly, their testimony sheds little light on the intentions of either the nineteenth century parties who negotiated the agreement between the Tribe and the federal government or of the Secretary of the Interior in making decisions to add trust land to an existing reservation. The defendants also point to evidence that the agency trust lands are located on two distinct parcels and are not contiguous, which is not surprising given the checkerboard nature of the allotments.

It is not clear that any of the defendants' evidence was truly "new" in the sense that it could not have reasonably been developed and presented in

earlier stages of this litigation. As another court pointed out in rejecting an attempt to challenge the law of the case with newly presented evidence, "[t]here is nothing in the record to indicate that the evidence produced at the hearing after remand was unavailable to the [litigants] during the first trial. [They] simply chose not to produce that evidence. They chose their trial strategy, litigated accordingly, and lost." *Baumer v. United States*, 685 F.2d 1318, 1321 (11th Cir.1982).

Most significantly, the rulings in *Gaffey II* have not been shown to be erroneous. They were based on an exhaustive analysis of the historical materials surrounding the Tribe's agreement with the federal government and the 1894 ratification of that agreement, as well as the subsequent history. *Gaffey II*, 188 F.3d at 1021-28.[7] As already pointed out, the Supreme Court has indicated that the agency trust land provision of the 1894 Act suggests Congress envisioned an ongoing reservation. *Yankton Sioux Tribe*, 522 U.S. at 350, 118 S.Ct. 789. Clearly the

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[7] The defendants rely on *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), a South Dakota Supreme Court decision released one day after *Gaffey II*. *Bruguier* was a habeas case dealing with the criminal jurisdiction status of a former allotment which had passed into white ownership (a category of land which *Gaffey II* held was not part of a diminished reservation). *Bruguier*'s conclusion that the Yankton Sioux Reservation had been disestablished in 1894 was more sweeping than necessary for resolution of the matter at issue, and none of the parties to this litigation participated in that case.

defendants disagree with much of *Gaffey II*, "but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate of chances from changes in its members." *Roberts v. Cooper*, 61 U.S. (20 How.) 467, 481, 15 L.Ed. 969 (1857). The law of the case as determined in *Gaffey II* continues to control this matter, and the district court did not err by following our mandate that the reservation still exists even though diminished and that it includes the agency trust lands.

The defendants also argue that two parcels of the agency trust land, totaling 106 acres, were not within the scope of the 1929 Act which returned the balance of the agency trust lands to the Tribe. These two parcels were conveyed by fee patents to the Chapter of Calvary Cathedral Episcopal Church in 1897 and in 1920. They were thus owned by that church when Congress directed in 1929 that the agency trust lands be returned to the Tribe, rather than be opened for white settlement once they were no longer needed for their intended purposes. The defendants argue that because these 106 acres were in private hands at the time of the 1929 Act, they were not within the Act's purview and are thus outside of *Gaffey II*'s holding that agency trust land "reserved to the federal government . . . and then returned to the Tribe continues to be a reservation." 188 F.3d at 1030. Whether the 1929 Act would have applied to these lands is moot, for in 1944 and 1945 the church returned these lands to the United States to be held in trust for the

Yankton Sioux Tribe. They thus comfortably fit within the holding of *Gaffey II* and are reservation land under the controlling law of this case.

IV.

We now turn to the jurisdictional questions at the heart of this case. Reservation land is by definition "Indian country," and as a general rule Indian country falls under the primary civil, criminal, and regulatory jurisdiction of the federal government and the resident Tribe rather than the states. *See Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n. 1, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998). Reservation status is not the only way to qualify as Indian country. Today the definition of Indian country is found in 18 U.S.C. § 1151 which was enacted in 1948 and reads in pertinent part as follows:[8]

> [T]he term "Indian country" . . . means **(a)** all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, **(b)** all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory

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[8] Section 1151 was originally enacted to define criminal jurisdiction, but its definition of Indian country is widely recognized to apply to civil matters as well *See Venetie*, 522 U S at 527, 118 S Ct 948

> thereof, and whether within or without the limits of a state, and **(c)** all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.
>
> Prior to the enactment of § 1151, the evolving concept of Indian country had mainly been developed and refined by the courts in their attempts to stay abreast of changing conditions in the American West and in federal Indian policy. *See Cohen,* § 3.04[2][b], at 184-88.

Congress reentered the debate in 1948 by adopting § 1151, Act of June 25, 1948, ch. 645, 62 Stat. 683, 757, but the statute mainly codified earlier Supreme Court decisions regarding Indian country. The language in § 1151(b) is taken almost verbatim from the Court's conclusion in *United States v. Sandoval,* 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913), that the federal government has a "duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State." *Id.* at 46, 34 S.Ct. 1. Likewise, § 1151(c) affirms the Court's holdings in *United States v. Pelican,* 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1914), and *United States v. Ramsey,* 271 U.S. 467, 46 S.Ct. 559, 70 L.Ed. 1039 (1926), that allotments constitute Indian country and fall within the jurisdiction of the federal government and the resident tribes.

Section 1151(a) confirms that reservations are properly considered Indian country and are therefore under the primary jurisdiction of the federal government and the relevant tribes. In this sense it is in accord with such cases as *Bates v. Clark*, 95 U.S. 204, 24 L.Ed. 471 (1877), and *Donnelly v. United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913). It also provides that reservation land remains Indian country "notwithstanding the issuance of any patent."

Section 1151(a) thus separates the concept of jurisdiction from the concept of ownership. In doing so Congress sought both to resolve inconsistencies in prior case law, *see* 18 U.S.C. § 1151 Historical and Revision Notes, and to maintain jurisdictional continuity where reservation lands had been patented in fee, *see Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357-58, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962). Prior to the passage of § 1151, land had generally ceased to be Indian country when Indian title was extinguished. *See, e.g., Clairmont v. United States*, 225 U.S. 551, 558, 32 S.Ct. 787, 56 L.Ed. 1201 (1912). Section 1151(a) abrogated this understanding of Indian country and, with respect to reservation lands, preserves federal and tribal jurisdiction even if such lands pass out of Indian ownership. *See Seymour*, 368 U.S. at 357-58, 82 S.Ct. 424 (concluding that under § 1151(a) reservation status applies even when land is purchased by a non Indian); *see also Solem*, 465 U.S. at 468, 104 S.Ct. 1161 ("Only in 1948 did Congress uncouple reservation status from Indian ownership. . . .").

A.

Having ruled in *Gaffey II* that the Yankton Sioux Reservation had not been disestablished, we remanded for the district court to consider, among other matters, the status of allotted trust lands which had retained their trust status. All sides to this litigation acknowledge, as they must, that such lands qualify at the very least as Indian country under § 1151(c), which explicitly identifies allotments as such. The disputed issue is whether these allotments are also part of the Yankton Sioux Reservation and therefore also qualify as Indian country under § 1151(a).

The distinction is important since lands which qualify only under § 1151(c) would lose their Indian country status if their governing trusts were ever terminated or revoked. If these lands also qualify as reservation, however, their Indian country status would be considerably more durable. Under § 1151(a) reservation lands retain their status "notwithstanding the issuance of any patent," including a patent which terminated a trust and conveyed the land in fee simple. After considering the evidence at trial, the district court held that the allotments were indeed part of an ongoing reservation and qualified as Indian country under § 1151(a).

The Supreme Court held in *Solem* that "[o]nce a block of land is set aside for an Indian reservation . . . the entire block retains its reservation status until Congress explicitly indicates otherwise." 465 U.S. at 470, 104 S.Ct. 1161. Furthermore, as we noted in

Gaffey II, congressional "[i]ntent to diminish or disestablish a reservation must be 'clear and plain.'" 188 F.3d at 1021 (quoting *United States v. Dion*, 476 U.S. 734, 738, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986)). While the 1894 Act clearly expressed Congress's intention to sever the ceded surplus lands from the reservation, *Yankton Sioux Tribe*, 522 U.S. at 337-38, 118 S.Ct. 789, Congress never expressed a similar intention with respect to the allotted lands. The simple act of dividing the Yankton Sioux Reservation into individual allotments was insufficient to divest the allotted lands of their reservation status.

Prior to the expiration of the trust period, the allotted lands "remained Indian lands set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings, the Government retaining control." *Pelican*, 232 U.S. at 449, 34 S.Ct. 396; *see also Mattz v. Arnett*, 412 U.S. 481, 496, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973) (holding that the policy of the Dawes Act "was to continue the reservation system and the trust status of Indian lands"); *United States v. Celestine*, 215 U.S. 278, 287, 30 S.Ct. 93, 54 L.Ed. 195 (1909) ("It is clear that the allotment alone could not [revoke the reservation]." (quoting *Eells v. Ross*, 64 F. 417, 419-20 (9th Cir.1894))). Furthermore, the Tribe's willingness to cede to the United States its *unallotted* lands does not indicate that the reservation status of *allotted* lands was also revoked. *Yankton Sioux Tribe*, 522 U.S. at 336, 118 S.Ct. 789 ("[W]e

have repeatedly stated that not every surplus land Act diminished the affected reservation."). More importantly, there is no indication in the historical record that either Congress or the Tribe expressly intended to eliminate the reservation status of the Yankton allotted lands immediately upon allotment or upon the sale of the Tribe's surplus holdings.

It is clear from the circumstances surrounding the Tribe's agreement to sell its surplus lands that the Tribe did not intend to relinquish immediate jurisdiction over the allotments and that it would not be required to part with them. In the discussions leading up to the agreement, a government negotiator explained to tribal members that

> [the Great White Father] wants to give you a chance to sell your surplus lands. . . . *He has told us to tell you that you will not be forced to part with your lands unless you want to. . . . He does not want you to sell your homes that he has allotted to you. He wants you to keep your homes forever.*

Council of the Yankton Indians (Oct. 8, 1892), *transcribed in* S. Exec. Doc. 27, 53d Cong., 2d Sess., 47, 49 (1894) (emphasis added). These reassurances acquire particular significance in light of the longstanding rule that an agreement between the United States and an Indian tribe should be "construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Washington v. Wash. State Commercial Passenger Fishing Vessel*

Ass'n, 443 U.S. 658, 676, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979) (quoting *Jones v. Meehan*, 175 U.S. 1, 11, 20 S.Ct. 1, 44 L.Ed. 49 (1899)).

In their report on the outcome of their negotiations with the Tribe, the federal commissioners wrote that "the purchase of the surplus lands was but a small part of our mission and of minor importance to both the Indians and the Government, the provisions connected therewith for the future welfare of the Indians being of greater importance. . . ." Report of the Yankton Indian Commission (Mar. 31,1893), *reprinted in* S. Exec. Doc. No. 27, 53d Cong., 2d Sess., 7, 17 (1894). In particular, the Tribe was anxious to insure that annuity payments from the federal government would continue uninterrupted. The historical evidence thus reveals that the Tribe, while willing to sell its surplus, was concerned with maintaining a presence on the allotted lands and preserving the support of the federal government and its superintendence over those lands.

The final agreement, as ratified in the 1894 Act, reflects this understanding. As already noted, the Act set aside the agency trust land specifically to support the Tribe, a provision which the Supreme Court found "counsels against finding the reservation terminated." *Yankton Sioux Tribe*, 522 U.S. at 350, 118 S.Ct. 789. Furthermore, the statute ratifying the parties' agreement guaranteed to the Indian allottees the "undisturbed and peaceable possession of their allotted lands" as well as "all the rights and privileges of the tribe." 1894 Act, 28 Stat. at 317.

Simply stated, there is nothing in the historical and documentary record to indicate a congressional intent to terminate the reservation status of the allotted lands immediately upon ratification of the 1894 Act or the opening of the ceded territory to white settlement. In the absence of such an intention, we must conclude that at the time of the Act those lands retained the same reservation status they had enjoyed since the original 1858 Treaty. Even if Congress had foreseen an eventual end to the reservation, one which would perhaps be hastened by the allotment policy,[9] such an expectation would not have been at odds to the nineteenth century mind with the ongoing maintenance of a reservation on the allotted lands. The fact that tribal members maintained beneficial property interests in the allotments is further evidence that the reservation status of those lands was preserved since at the time Indian land ownership was linked with reservation status. *See, e.g., Solem*, 465 U.S. at 468, 104 S.Ct. 1161 ("The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century.").

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[9] It is worth noting that the eventual expiration of the allotments was never a foregone conclusion. The Dawes Act allowed the president to extend the allotment period, which Presidents Wilson, Coolidge, and Hoover each did. The allotments were then indefinitely extended under the 1934 Indian Reorganization Act.

In the course of setting out the twists and turns in the federal policy regarding tribal lands, *Gaffey II* recounted Congress's original expectation that allotments would lose their reservation status as they passed out of Indian ownership and into white hands. 188 F.3d at 1028. That original concept was not inconsistent with the maintenance of reservation status for the allotted lands so long as they were held in trust. The defendants claim that because allotments lost their Indian country status when they passed out of Indian hands, they cannot be reservation under § 1151(a) since under that subsection the Indian country status of reservation land is unaffected by ownership. The flaw in the defendants' argument is its anachronistic attempt to apply § 1151 on the basis of congressional intentions around 1894. Such nineteenth century intentions are central to our determination of whether the reservation was ever disestablished, but they cannot govern the classification of lands under the later congressional enactment of § 1151, for the 1948 enactment of § 1151(a) introduced concepts which would have been "unfamiliar at the turn of the century." *Solem*, 465 U.S. at 468, 104 S.Ct. 1161.

It is irrelevant for present purposes what the 1894 Congress expected to happen to allotments after they lost trust status, for the allotments at issue in this case have been continuously held in trust. The determinative question is simply whether they are now "reservation" within the meaning of § 1151(a). Having found no congressional intent in the 1894 Act

to divest these lands of their reservation status, we can only conclude that they remain reservation to this day, for "when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." *Celestine*, 215 U.S. at 285, 30 S.Ct. 93; *Solem*, 465 U.S. at 470, 104 S.Ct. 1161. It follows that allotments still held in trust are "land within the limits of [an] Indian reservation under the jurisdiction of the United States Government." § 1151(a).

Any alleged inconsistency between our holding in *Gaffey II* and the district court's determination in this case that allotments are reservation land under § 1151(a) is nothing of the sort. It merely reflects the evolution of federal Indian policy and the defendants' anachronistic attempt to force a nineteenth century agreement into the mold of current legal principles.[10] The district court did not err when it concluded that all outstanding allotted lands continue to be reservation and qualify as Indian country under § 1151(a).

B.

On remand the district court was also asked to consider the status of lands taken into trust by the federal government pursuant to the Indian

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[10] As already discussed, the origins of the checkerboard pattern of the Yankton Sioux Reservation lie in the federal government's former allotment policies and its liberal issuance of fee patents under the Burke Act.

Reorganization Act. The district court concluded that when lands which were once part of the original 1858 reservation were taken into trust under the IRA, they reacquired reservation status. It identified 6,444.47 acres of such land and classified them as Indian country under § 1151(a). The defendants appeal this holding while the Tribe and the United States support it.[11]

Congress passed the IRA in 1934, authorizing the Secretary of the Interior "to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians." IRA § 5, 25 U.S.C. § 465. The purpose of the Act was to further the independence of tribes and strengthen their ability to govern themselves. *See Cohen*, § 1.05, at 86 (The IRA was meant "to encourage economic development, self-determination, cultural pluralism, and the revival of tribalism."). Its provisions are meant "to stabilize the tribal land base," *Nichols v.*

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[11] The defendants also claim that the United States failed formally to approve some 29 deeds conveying land in trust. These deeds affect approximately half of the IRA trust lands. The defendants argue that since the deeds were recorded without a formal acceptance by the government, the lands conveyed by them are not validly held in trust and cannot qualify as Indian country under any portion of § 1151. As the district court observed, "this case involves jurisdiction issues and does not affect title to real estate." *Podhradsky*, 529 F.Supp.2d at 1043. It pointed out that the federal government's sovereign immunity was not waived by the Quiet Title Act, 28 U.S.C. § 2409a (specifically exempting "trust or restricted Indian lands" from a more general waiver of immunity).

Rysavy, 809 F.2d 1317, 1323 (8th Cir.1987), and to that end the legislation was "designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and *repurchase of former tribal domains*." *Cohen*, § 1.05, at 86 (emphasis added).

The defendants argue that taking land into trust for the benefit of an Indian tribe is insufficient to convert such land into Indian country, but their position runs contrary to well settled precedent. As the Supreme Court has recognized, "[s]ection 465 provides the proper avenue for [a tribe] to reestablish sovereign authority over territory. . . ." *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 221, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005). This court has also acknowledged that land held in trust under § 465 is effectively removed from state jurisdiction. In *Chase v. McMasters*, 573 F.2d 1011 (8th Cir.1978), we noted that when Congress enacted § 465 "it doubtless intended and understood that the Indians for whom the land was acquired would be able to use the land free from state or local regulation or interference as well as free from taxation." *Id.* at 1018.[12] *See also*

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[12] The defendants point to dictum in *United States v. Stands*, 105 F.3d 1565 (8th Cir.1997), that "tribal trust land beyond the boundaries of a reservation is ordinarily not Indian country." *Id.* at 1572. The issue in *Stands* was whether a particular parcel of land was or was not an allotment, the parties made no argument regarding the Indian country status of trust lands since that issue was irrelevant. *Id.* at 1572 n. 3. Even so, *Stands* acknowledged that "[i]n some circumstances,

(Continued on following page)

United States v. Roberts, 185 F.3d 1125, 1131 (10th Cir.1999) ("[L]ands owned by the federal government in trust for Indian tribes [under § 465] are Indian country pursuant to 18 U.S.C. § 1151."); *Langley v. Ryder*, 778 F.2d 1092, 1095 (5th Cir.1985) ("[W]hether the lands [acquired pursuant to § 465] are merely held in trust for the Indians or whether the lands have been officially proclaimed a reservation, the lands are clearly Indian country.").

The Tribe and the United States assert that when former reservation land is reacquired in trust under the IRA it is not just Indian country, but a particular *type* of Indian country, namely reservation within the meaning of § 1151(a). The difference is important because Indian country under § 1151(a) has the distinct property of retaining its status "notwithstanding the issuance of any patent." In other words, such land remains part of the reservation even if sold. The defendants argue, however, that the Yankton IRA trust lands do not qualify as reservation under § 1151(a) because the Secretary of the Interior has not issued a formal proclamation to that effect. They rely on § 7 of the IRA, 25 U.S.C. § 467, which provides that the Secretary "is . . . authorized to proclaim new Indian reservations on lands acquired . . . *or* to add such lands to existing reservations" (emphasis added).

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off-reservation tribal trust land may be considered Indian country." *Id*

While there is no doubt that § 467 requires a proclamation when the Secretary wishes to establish a new reservation, the statute does not state that a proclamation is required when the Secretary decides to add land to a preexisting reservation such as that of the Yankton Sioux. Congress left the decision to the Secretary, authorizing the Secretary "to proclaim new Indian reservations . . . or to add such lands to existing reservations." *Id.* (emphasis added). The statutory language does not itself require a proclamation in the case of preexisting reservations, and the "cardinal canon" of statutory interpretation is "that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). By taking former Yankton Sioux Reservation lands back into trust under the IRA, the Secretary effectively exercised his authority to consolidate the Tribe's land base by restoring reservation status to former pieces of a reservation in existence since 1858.

When § 467 was drafted in 1934, the concept of Indian country lacked the benefit of § 1151's precise definition. Fine distinctions between reservation land, trust land, allotted land, dependent Indian communities, and the like would have carried little practical weight since jurisdiction was at the time essentially synonymous with Indian ownership. It would therefore have made sense for the congressional drafters of § 467 to provide for the Secretary to distinguish by means of a proclamation between

acquisitions of land intended to create a new reservation and acquisitions of land simply to be held in trust. Land held in trust by the federal government for addition to an existing Indian reservation would have been perceived as under federal jurisdiction even without a proclamation.

The IRA "was designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and *repurchase of former tribal domains.*" *Cohen*, § 1.05, at 86 (emphasis added). Indeed, a principle motivation for the IRA was to "permit progress toward the consolidation of badly checkerboarded Indian reservations." 78 Cong. Rec. 11,730 (1934) (statement of Rep. Howard). In keeping with that legislative intent, the Secretary made the decision to reacquire land in trust which had been formerly recognized as part of an existing reservation, the Yankton Sioux Reservation. This is entirely different from acquisition of land never previously recognized as under Indian jurisdiction. When the Secretary proclaims an intent to reincorporate trust land as a new reservation, it serves to give notice to all of a significant change in condition.

The parties most directly affected by a trust acquisition – the United States as trustee and the Tribe as beneficiary – both agree that the Secretary's decision to take former Yankton Sioux Reservation land into trust was sufficient to restore that land to its previous reservation status. The Secretary has preeminence in interpreting laws under the

Department's jurisdiction, *Tang v. INS*, 223 F.3d 713, 719 (8th Cir.2000) (according "substantial deference to the agency's interpretation of the statutes and regulations it administers"), and has never seen it necessary to issue a proclamation in respect to the Yankton IRA trust lands despite this extended litigation. The interests of the defendants are protected by administrative procedures in the Department of the Interior in which trust acquisitions are balanced against a multitude of factors, including "[j]urisdictional problems and potential conflicts of land use." 25 C.F.R. § 151.10(f).

The regulations reflect that the acquisition of former reservation land is likely to pose fewer problems than an acquisition of land which has no historical connection to a tribe's land base. Current regulations treat trust acquisitions of former reservation lands as "on reservation" rather than "off reservation" transactions, *see* 25 C.F.R. § 151.2(f) (defining reservation to include "that area of land constituting the former reservation"), and subject them to less searching scrutiny. For example, if a tribe requests an off reservation acquisition – that is, one involving land which is not nor ever has been part of a reservation – the regulations require the Secretary to consider "[t]he location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation." 25 C.F.R. § 151.11(b). If off reservation land is being acquired for business purposes, "the tribe shall provide a plan which specifies the anticipated economic benefits." *Id.* § 151.11(c).

Such regulations are consistent with our own analysis that restoration through the IRA of territory historically part of the Yankton Sioux Reservation is distinguishable from the acquisition of lands never within Indian domain and may be accomplished without a proclamation.

Moreover, the defendants can cite no statutory language or case law making an official proclamation necessary before former reservation lands can reacquire their reservation status. The only case they point to involved the establishment of a new reservation, not the return of former reservation land to an existing one, and is thus inapposite. *See Citizens Exposing Truth about Casinos v. Kempthorne,* 492 F.3d 460 (D.C.Cir.2007).

The defendants also argue that treating trust acquisitions of former reservation land differently from other acquisitions would grant significance to the 1858 boundaries despite the Supreme Court's determination in *Yankton Sioux Tribe,* and our own conclusion in *Gaffey II,* that the original boundaries have been altered by the reservation's diminishment. While it is true that the original 1858 boundaries are no longer markers dividing jurisdiction between the Tribe and the state, that does not mean to say they have lost their historical relevance for the Secretary's discretionary acts. Defendants argue that the IRA's legislative history, the Department of the Interior's internal guidelines, and the *Cohen* handbook stand for the proposition that some official action beyond

the acquisition of land is necessary when adding trust land to an existing reservation.

Here, the lands under consideration were part of this tribe's 1858 reservation and have been reacquired in trust "for the purpose of providing land for Indians." 25 U.S.C. § 465. We believe this presents a distinct question, one which the sources cited by the defendants simply do not resolve. There is a fundamental difference between acquiring land which has no historical connection to an existing reservation and reacquiring land which once formed part of a Tribe's land base. While Congress has provided that an official proclamation by the Secretary is necessary for adding such unrelated land to a reservation, it has not required it for the latter. The district court did not err in its conclusion that all lands taken into trust by the Secretary under § 465 fall within the jurisdiction of the Yankton Sioux Reservation and qualify as Indian country under § 1151(a).

C.

Although the district court identified 174.57 acres of miscellaneous land acquired in trust other than under the IRA, it did not directly address the status of these miscellaneous lands. Its separate discussion of dependent Indian communities was broad enough to cover all trust properties, however, including the miscellaneous plots.

In *Venetie* the Supreme Court noted that it had not yet "had an occasion to interpret the term

'dependent Indian communities'" as the term is used in § 1151(b). 522 U.S. at 527, 118 S.Ct. 948. In construing the term for the first time, the Court held that "it refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements – first, they must be set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." *Id.*

The miscellaneous trust lands easily meet this definition. The lands were acquired for the use and benefit of the Yankton Sioux Tribe, and the district court found that the federal Bureau of Indian Affairs "negotiates the leases, collects the rents and distributes the rents according to tribal status reports" with respect to these lands. *Gaffey I*, 529 F.Supp.2d at 1055. Testimony by a Federal Bureau of Investigation agent confirmed that the federal government exercises criminal jurisdiction over these trust lands. *Id.* This is more than enough to meet the standard for Indian country under § 1151(b). *See, e.g., Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (concluding that "property . . . held by the Federal Government in trust for the benefit" of a tribe qualifies as Indian country).

The defendants argue that the federal government's administration of these lands in trust is insufficient to meet the Supreme Court's definition of dependent Indian communities as it was announced and applied in *Venetie*. That case involved lands held

under the Alaska Native Claims Settlement Act (ANCSA), Pub.L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. § 1601 *et seq.*). ANCSA was specifically "intended to avoid a 'lengthy wardship or trusteeship.'" *Venetie*, 522 U.S. at 533, 118 S.Ct. 948. As the Court observed, ANCSA explicitly eliminated the Venetie Reservation and transferred the lands "to private, state-chartered Native corporations, without any restraints on alienation or significant use restrictions, and with the goal of avoiding 'any permanent racially defined institutions, rights, privileges, or obligations.'" *Id.* at 532-33, 118 S.Ct. 948. The land at issue in *Venetie* thus had virtually no resemblance to the Yankton Sioux trust land. Conveyance of the latter remains subject to the Secretary's oversight and approval, and the government continues to hold title to the land in trust, to administer leases on it, and to provide law enforcement services on it.

Consequently, we conclude that the miscellaneous trust lands at issue in this case qualify as dependent Indian communities and are Indian country under § 1151(b).

D.

The Tribe and the United States also urge us to uphold the district court's determination that former allotments which have been continuously held in fee

by Indian owners constitute reservation land. The defendants seek reversal.[13]

Although we might assume that such lands exist, the record does not identify any or their relevant histories. We therefore conclude that this issue is not ripe for resolution. "The ripeness doctrine flows both from the Article III 'cases' and 'controversies' limitations and also from prudential considerations for refusing to exercise jurisdiction." *Neb. Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1037 (8th Cir.2000). In *Nebraska Public Power District*, we held that "to resolve an issue lacking factual development simply to avoid a threatened harm would be to favor expedition over just resolution." *Id.* at 1039.

Here, a number of potentially important facts are missing with respect to Indian owned fee lands continuously held by tribal members. To start, no one has identified which, if any parcels, fit within this category. Moreover, the status of such lands may depend on a number of unknown factors, including whether the allotments expired at the natural end of the trust period, whether the fee patents were issued

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[13] The defendants maintain that our mandate in *Gaffey II* limited the district court to an analysis of trust lands. This is incorrect, for we noted that the record then before us was insufficient to address the issue of fee lands continuously held in Indian ownership, 188 F.3d at 1030, and remanded "for further proceedings consistent with this opinion," *id.* at 1031. There was no explicit or implicit instruction limiting the district court to consideration of trust lands.

at the request of allottees, or whether the fee patents were "forced" on allottees pursuant to the Burke Act. After deciding that this category of land remained reservation, the district court noted that many of these historical facts could be developed by consulting "the land title records maintained by the BIA's Realty Office." *Podhradsky*, 529 F.Supp 2d at 1056-57. Such facts are currently absent in the record before us, and general conclusory descriptions do not clarify who can exercise jurisdiction over an area. Without the benefit of a fully developed record on these issues, we decline to consider this question and accordingly vacate that portion of the district court's decision and judgment.

E.

The Tribe further asserts that two Congressional enactments – the Act of March 3, 1927, § 4, ch. 299, 44 Stat. 1347 (codified as amended at 25 U.S.C. § 398d) (1927 Act), and the 1934 IRA – froze the boundaries of the reservation. Consequently, it argues, any lands alienated in fee to whites during the effective period of any such freeze should be considered part of the reservation. The district court determined, however, that the 1927 Act does not apply to the Yankton Sioux Reservation and that whatever freeze the IRA may have imposed was lifted by the Supervised Sales Act, ch. 293, 62 Stat. 236 (1948) (codified at 25 U.S.C. § 483) (Sales Act). The United States and the defendants ask us to uphold the district court rulings on these issues.

With respect to the 1927 Act, the Tribe maintains that the statute prohibited alterations to the boundaries of any Indian reservation except by act of Congress. The defendants respond that the plain terms of the 1927 Act limit its application to reservations created by executive action rather than by treaty. The district court agreed with the defendants and concluded that the statute was inapplicable in the current dispute.

By the mid nineteenth century, Presidents "had begun to withdraw public lands from sale by executive order for the specific purpose of establishing Indian reservations." *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 325, 62 S.Ct. 1095, 86 L.Ed. 1501 (1942). Although there were initial questions about the legitimacy of these "executive order" reservations, any doubts were removed by *United States v. Midwest Oil Co.*, 236 U.S. 459, 35 S.Ct. 309, 59 L.Ed. 673 (1915), in which the Supreme Court held that the President has the power to withdraw lands from the public domain even in the absence of express statutory authority. These executive order reservations are nonetheless distinguishable from those created by treaty or by act of Congress.

The language of the 1927 Act does indeed limit its application to executive order reservations: "[H]ereafter changes in the boundaries of reservations created by *Executive* order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress. . . ." 44 Stat. at 1347 (emphasis added). The natural meaning of

this language is that it applies only to reservations created by the executive branch, whether by executive order, executive proclamation, or other executive action, and *Sioux Tribe of Indians* recognizes as much. 316 U.S. at 325 n. 6, 62 S.Ct. 1095 ("In 1927, Congress added a provision that any future changes in the boundaries of *executive order reservations* should be made by Congress alone." (emphasis added)). The Yankton Sioux Reservation was created by the 1858 Treaty, is not an executive order reservation, and is therefore outside the freeze contemplated by this statute.

The Tribe also argues that the 1934 IRA froze the reservation's boundaries. Section 2 of that act indefinitely extended the trust period for all outstanding allotments, 48 Stat. at 984 (codified at 25 U.S.C. § 462), while § 4 states that "[e]xcept as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands . . . shall be made or approved. . . ." *Id.* at 985 (codified as amended at 25 U.S.C. § 464). The district court concluded that these provisions effectively froze any further diminishment of the Yankton Sioux Reservation, but it also concluded that the Supervised Sales Act, ch. 293, 62 Stat. 236 (1948) (codified at 25 U.S.C. § 483) (Sales Act), lifted whatever freeze was imposed. *See Oglala Sioux Tribe of Pine Ridge Indian Reservation v. Hallett*, 708 F.2d 326, 330-31 (8th Cir.1983) (concluding that the Sales Act lifted restrictions).

We have never squarely confronted the effect of the IRA on the Secretary's authority under the Burke

Act to issue fee patents to "competent" allottees, thereby removing trust restrictions on the alienation and conveyance of Indian lands. However, in *Oglala Sioux Tribe*, we assumed without deciding that the IRA had effectively frozen the Secretary's ability to issue fee patents. *Id.* at 330. In the same case, we also determined that the Sales Act had lifted any such freeze. *Id.* at 330-31.

The Tribe argues that allotments on the Yankton Sioux Reservation were unaffected by the Sales Act since they had been granted under the Dawes Act and the 1891 Act, not under the IRA. While it is true that by its terms the Sales Act applies to allotments "held . . . under" the IRA, 25 U.S.C. § 483, we concluded in *Oglala Sioux Tribe* that by extending indefinitely the trust periods of previously awarded allotments, the IRA brought within its protection even allotments awarded prior to its enactment. 708 F.2d at 331. In other words, the Yankton Sioux allotments, although originally granted under the Dawes Act and the 1891 Act, would have expired but for the IRA's extension of the trust period. That is enough for them to be "held . . . under" the IRA. "[T]he allotments would not be 'held' . . . at all without the Indian Reorganization Act." *Id.* Since the trust periods on the Yankton allotments would have expired but for the IRA, they are "held" under that statute and any freeze imposed on their conveyance was lifted by the Sales Act.

The Tribe argues that even if the Sales Act did undo an IRA imposed freeze, land conveyances in fee to whites during the effective period of the freeze

were improper and should be disregarded for the purpose of defining the reservation's current boundaries. The Tribe's arguments suffer from an insufficient factual record, however. As the district court noted with respect to the Tribe's 1934 freeze claim, "no proper foundation was established for the admission of . . . evidence" indicating that any land would have been affected by such a freeze. *Gaffey I*, 529 F.Supp.2d at 1051. We conclude that the Tribe's claim that the reservation boundaries were frozen in 1934 is not ripe for resolution on the record before the court.

V.

In the absence of any clear congressional intent to divest allotted lands on the Yankton Sioux Reservation of their reservation status, those lands retained such status, and all outstanding allotments continue to be reservation under § 1151(a). Furthermore, lands originally part of the Tribe's 1858 reservation regained their status as reservation land under § 1151(a) when acquired in trust under the Indian Reorganization Act. The miscellaneous trust lands, by contrast, qualify as part of a dependent Indian community and are therefore Indian country under § 1151(b). Finally, the record regarding fee lands continuously held by tribal members is not ripe for review.

With respect to the judgment of the district court, we therefore:

(1) affirm insofar as it concluded that the agency trust lands, the outstanding allotments, and the IRA trust lands are part of the Yankton Sioux Reservation and are Indian country under § 1151(a),

(2) affirm its alternative holding that the miscellaneous trust lands constitute a dependent Indian community and are Indian country under § 1151(b),

(3) vacate the district court's holding that fee lands continuously held in Indian ownership are reservation under § 1151(a), and

(4) affirm its denial of all other claims for relief.

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606 F.3d 985

United States Court of Appeals,
Eighth Circuit.
YANKTON SIOUX TRIBE, and its individual members, Plaintiffs-Appellees/Cross-Appellants,
United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe, Intervenor Plaintiff-Appellee,
v.
Scott J. PODHRADSKY, State's Attorney of Charles Mix County; C. Red Allen, member of the Charles Mix, South Dakota, County Commission; Keith Mushitz, member of the Charles Mix, South Dakota, County Commission; Sharon Drapeau, member of the Charles Mix, South Dakota, County Commission; M. Michael Rounds, Governor of South Dakota; Lawrence E. Long, Attorney General of South Dakota, Defendants-Appellants/Cross-Appellees,
Southern Missouri Waste Management District, Interested Party.
Rosebud Sioux Tribe, Amicus on behalf of Appellees.
Nos. 08-1441, 08-1488.

May 6, 2010.

Order on Petitions for Rehearing.

Before MURPHY, MELLOY, and SHEPHERD, Circuit Judges.

Appellant officials of the State of South Dakota and Charles Mix County filed petitions for rehearing and rehearing en banc of the court's August 25, 2009 decision in this matter. The Yankton Sioux Tribe and the United States filed their individual responses to the petitions on January 25, 2010, supporting the

court's decision and judgment. Now before the court are the petitions for panel rehearing.

In the meantime we have permitted amici to file six briefs in support of the petitions[1] and granted a motion by the state appellants to file a supplement to their petition. Still pending are motions by the Rosebud Sioux Tribe to file an amicus brief opposing the petitions and by the county appellants to file a supplemental petition for rehearing and rehearing en banc. The United States and the Yankton Sioux Tribe have filed oppositions to the county appellants' motion, which was filed the same day as the responses to the original petitions. The Tribe has also argued that the new factual materials submitted by the state appellants in their petition and the supplement thereto should be stricken.

Recently petitioners filed a joint motion on April 6, 2010 seeking leave to amend their petitions for rehearing to include new arguments based on *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 217-21, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005), and also proposing that the court "remand this case to the district court to allow the district court an opportunity to consider

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[1] The amici supporting the petitions are the Charles Mix Electric Association, several South Dakota counties which include former Indian allotments, the Wagner Community School District, the Southern Missouri Waste Management District, several cities within the original boundaries of the Yankton Sioux Reservation, and a number of individuals who own land within the original boundaries of the reservation

[*City of Sherrill*], or in the alternative, determine the case in [their] favor . . . or, in the further alternative, allow the parties to fully brief the issues for the panel and the Court." Motion to Support Proposed Amendment to State and County Petitions for Rehearing and Rehearing en Banc at 1. The Tribe and the United States filed responses in opposition to this belated motion on April 16, 2010.

Petitioners based their original requests for rehearing on two primary grounds. They object to some language in our 2009 opinion touching on former allotments within the original boundaries of the Yankton Sioux Reservation which were patented in fee after 1948. Petitioners also renew their earlier unsuccessful arguments that the Yankton Sioux Reservation has been disestablished, continuing to disagree with the decision to the contrary reached more than ten years ago after extensive litigation in *Yankton Sioux Tribe v. Gaffey (Gaffey II),* 188 F.3d 1010 (8th Cir.1999), *reh'g* and *reh'g en banc denied, cert. denied,* 530 U.S. 1261, 120 S.Ct. 2717, 147 L.Ed.2d 982 (2000).

What petitioners have generally not done in their petitions for rehearing is to attack the judgment actually rendered by the court on August 25, 2009. Instead, they raise a virtual smokescreen by focusing on dicta in a single footnote of our 37 page decision.[2]

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[2] Footnote 10 in the opinion read as follows

It is unclear from the record whether any allotments have been patented in fee since 1948 and subsequently

(Continued on following page)

The second and third sentences of that footnote are the basis from which petitioners mount their attack, but these sentences did not speak to any matter actually litigated or decided in this case. Nor was such language ever incorporated into our judgment which only determined the status of trust lands within the former boundaries of the Yankton Sioux Reservation, our judgment in *Gaffey II* having determined that the reservation had never been disestablished.

That petitioners are well aware of the limited scope of our judgment is evidenced by the county's letter proposing that the language which they attack be added to the court's judgment. Letter from Tom D. Tobin to Michael E. Gans, Clerk of Court (Nov. 5, 2009) (noting that the proposition that "allotments patented in fee since 1948 and now held by non-Indians continue to be Indian country under the terms of 18 U.S.C. § 1151(a) . . . does not appear to be included or set forth in the paragraph at the conclusion of the opinion" and requesting that the clerk bring that "possible oversight" to the attention of the court). In drafting the judgment in Part V of the August 2009 opinion the court acted intentionally in stating all matters it actually decided in this case.

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sold to white owners. If such lands exist, however, they would continue to be Indian country under the clear terms of § 1151(a) The holding in *Gaffey II* that lands which passed into white ownership lost reservation status thus only applies to pre 1948 conveyances

In sum, petitioners raise objections to issues which the court did not decide and which are beyond the scope of this litigation. They raise concerns about the possible consequences of a decision which the court has not reached. Since the language on which petitioners have focused is extraneous to what was actually decided by the court, we will grant the petitions for rehearing for the limited purpose of withdrawing the opinion filed on August 25, 2009 and replacing it with a revised opinion. The revised opinion contains the identical judgment but eliminates footnote 10 and several textual asides touching on matters not litigated or decided, but which have possibly been misunderstood.

I.

The long history of this litigation which began in 1994 is set out in detail in our decision. *Yankton Sioux Tribe v. Podhradsky (Podhradsky II),* 577 F.3d 951, 959-60 (8th Cir.2009). The latest chapter of the case was initiated by our 1999 remand to the district court in *Gaffey II,* a decision on which the Supreme Court denied certiorari. *Gaffey II* held that the Yankton Sioux Reservation was never disestablished and that some original agency lands identified by the Supreme Court in *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 350, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), remained part of a continuing reservation. *See Gaffey II,* 188 F.3d at 1030. We observed that the record before the court was inadequate to "define the precise limits" of the remaining

reservation, particularly with respect to lands within the original boundaries of the reservation which were held in trust. *Id.* We therefore remanded for the district court to develop a record concerning such trust lands. *Id.* at 1030-31.

After our remand the district court held a trial[3] and then determined that three categories of trust lands remain part of the Yankton Sioux Reservation under 18 U.S.C. § 1151(a): (1) land which was reserved to the federal government in the 1894 Act and then subsequently returned to the Tribe; (2) land which had been allotted to individual Indians and was still held in trust; and (3) land which was taken into trust under the Indian Reorganization Act of 1934. *Yankton Sioux Tribe v. Podhradsky (Podhradsky I),* 529 F.Supp.2d 1040, 1058 (D.S.D.2007). These conclusions fit squarely within the scope of our remand order. The district court went beyond the specific directions of our mandate in one respect, however, in that it also addressed land continuously owned in fee by individual Indians. The district court concluded that such land remained part of the reservation and denied all other claims for relief. *Id.* Both sides appealed.

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[3] During a two day trial the district court took testimony and admitted numerous documents. The record includes thousands of pages relating to more than 150 tracts of land, including deeds, title reports, and correspondence concerning BIA management of the trust lands. It also includes numerous maps as well as legislative and administrative materials related to the reservation and its status to relevant federal authorities.

Our subsequent opinion affirmed the judgment of the district court in respect to each category of trust land and affirmed its alternative holding that miscellaneous trust lands were a dependent Indian community under § 1151(b). *Podhradsky II*, 577 F.3d at 974. We vacated one portion of the district court's judgment, however. That portion which held that fee lands continuously owned by Indians were part of the diminished reservation was vacated because the record remained inadequate to determine the status of such lands. *Id.* at 972, 974. Finally, we affirmed the denial of all other claims. *Id.* at 974.

Our mandate to the district court in *Gaffey II*, the district court's judgment on remand in *Podhradsky I*, and our judgment on this appeal (*Podhradsky II*) concerned specific, discrete issues-namely, the status of some 37,000 acres of trust land within the original boundaries of the Yankton Sioux Reservation. The only other category of land ruled on by the district court was fee land continuously owned by Indians, and we vacated that part of the district court's judgment. Our own August 2009 judgment in *Podhradsky II* was explicitly limited to trust lands.

II.

Rather than focusing on the actual judgment, petitioners focus on the undeveloped suggestion in footnote 10 of our opinion that 18 U.S.C. § 1151(a) might be applied to former allotments patented in fee after the statute's enactment in 1948. By claiming

that the presence of this hypothesis unrelated to our holdings and never incorporated into our conclusions or judgment "abruptly transformed the status of at least 7,250 acres of land," petitioners have raised a straw man to attack. State Appellants' Petition for Rehearing and Petition for Rehearing En Banc at 1. They have then spun out some possible consequences if the court had decided what they protest, raising fears about land owned by local government entities such as the Wagner Community School District and the Wagner Fire Protection District. See Charles Mix County's Petition for Rehearing and Petition for Rehearing En Banc at 8. Their amici go further in claiming "devastating effects" if the Yankton Sioux Tribe were able to impose taxes and various regulations on non Indian landowners. Brief of Leonard Kreeger et al. as *Amicus Curiae* in Support of State and County Petitions at 4-5.

In their responses neither the Tribe nor the United States focus on footnote 10, but they assert that petitioners' fears are overblown. The Tribe argues that speculation about any potential future impact is not a sufficient basis for rehearing. The United States points out that "[d]espite a decade of experience with a post-*Gaffey* checkerboard Reservation, this area of South Dakota has not experienced any of the problems described by the State, County or *amici*." United States' Response to the Petitions for Panel Rehearing Filed by the State of South Dakota and Charles Mix County at 4 n. 2.

We need not address each individual point petitioners raise because they are well aware that the wording to which they object is not part of the judgment in this case, as evidenced by the county's suggestion for its incorporation. The status of fee lands not owned by Indians was not considered or decided by the district court, nor was the issue litigated on appeal. The record remains inadequate to decide the status of such lands, just as it was inadequate to decide the status of Indian owned fee lands. *See Podhradsky II*, 577 F.3d at 971-72. The final two sentences in footnote 10 and other extraneous language were in the nature of a hypothetical reflection stimulated by study of shifting federal Indian policy over the years. Because these dicta were not incorporated into the judgment, they are not binding upon the parties and do not provide a reason to revisit the substance of our decision. *See Coen v. American Sur. Co. of New York*, 120 F.2d 393, 400 (8th Cir.1941); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 333 F.3d 763, 766 (7th Cir.2003); *cf. ACLU of N.J. v. Schundler*, 168 F.3d 92, 98 n. 6 (3d Cir.1999) (standards for rehearing en banc "look to the panel's *decision*, not to the panel's dicta") (emphasis in original). They should therefore be eliminated from the decision.

III.

The second ground upon which petitioners seek rehearing is their continuing effort to disestablish the Yankton Sioux Reservation. In *South Dakota v.*

Yankton Sioux Tribe, the Supreme Court declined to adopt their proposition that the reservation was disestablished by the 1894 congressional ratification of an agreement with the Tribe that ceded certain reservation lands to the United States. 522 U.S. at 357-58, 118 S.Ct. 354. The Court also declined to answer the question of whether the Yankton Sioux Reservation had been diminished beyond the loss of those unallotted lands specifically severed in the agreement. *Id.* Instead, the Court recognized arguments on both sides of the issues and remanded the question for determination by the lower courts. Since the Supreme Court's decision, petitioners have unsuccessfully pressed their disestablishment argument twice before the district court, *see Yankton Sioux Tribe v. Gaffey (Gaffey I)*, 14 F.Supp.2d 1135, 1137 (D.S.D.1998); *Podhradsky I*, 529 F.Supp.2d at 1043-44, and twice before this court, *see Gaffey II*, 188 F.3d at 1015; *Podhradsky II*, 577 F.3d at 961.

At each level their disestablishment arguments have been squarely rejected after thorough study of the record and exhaustive consideration of the precedents. *Gaffey II*'s 1999 holding that the Yankton Sioux Reservation was never legally disestablished is the law of the case. *See Podhradsky II*, 577 F.3d at 962-63. We also note that the Supreme Court chose not to grant certiorari on the issue in 2000. Petitioners have again failed to show that the court's decision was incorrect. Moreover, they have pointed to no facts or legal authority previously overlooked by the court which would support reconsideration of that

determination. "The purpose of a petition for rehearing . . . is to direct the Court's attention to some material matter of law or fact which it has overlooked in deciding a case, and which, had it been given consideration, would probably have brought about a different result." *NLRB v. Brown & Root, Inc.*, 206 F.2d 73, 74 (8th Cir.1953); *see also* Fed. R.App. P. 40(a)(2); 16A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice & Procedure § 3986.1 (4th ed. 2008) ("It should go without saying that a petition for rehearing should not be filed simply to reargue matters already argued unsuccessfully in the original appeal proceedings.").

Petitioners do seek support for their disestablishment argument in a recent Tenth Circuit decision, *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir.2010). In *Osage Nation*, the Nation sought a declaration that its members residing and employed in Osage County, Oklahoma were exempt from paying state income tax because the county was still Indian country. *See id.* at 1120. The court concluded, however, that the Osage Nation's former reservation had been disestablished by a 1906 Act of Congress. *Id.* That 1906 statute has no equivalent in the history of the Yankton Sioux, and the respondents argue that *Osage Nation* is not in any way inconsistent with our decision in this case. We agree.

Osage Nation addressed a unique surplus land act and a reservation with a historical context unlike that of the Yankton Sioux Reservation. Applying familiar legal principles, the Tenth Circuit discerned

from the circumstances surrounding the passage of the Osage Allotment Act that there was "clear congressional intent and Osage understanding that the reservation would be disestablished." *Id.* at 1124. In contrast, the 1894 Act which ceded surplus land from the Yankton Sioux Reservation reflected the parties' intent to "preserv[e] the support of the federal government and its superintendence over [the allotted] lands." *Podhradsky II*, 577 F.3d at 966 (*citing* Report of the Yankton Indian Commission (Mar. 31, 1893), *reprinted in* S. Exec. Doc. No. 27, 53d Cong., 2d Sess., 7, 17 (1894)).

Neither the language of the 1894 Act dealing with the land of the Yankton Sioux Reservation nor the circumstances surrounding its passage evinced a clear congressional intent to disestablish the reservation. Absent such clear intent, the reservation remains for "*[o]nce a block of land is set aside for an Indian Reservation . . .* [it] *retains its reservation status until Congress explicitly indicates otherwise.*" *Solem v. Bartlett*, 465 U.S. 463, 470, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984) (emphasis added). *Osage Nation* in fact supports our decision in *Podhradsky II*, for it recognized that "Congress's intent to terminate [a reservation] must be clearly expressed, and there is a presumption in favor of the continued existence of a reservation." *Osage Nation*, 597 F.3d at 1122 (*citing Yankton Sioux Tribe*, 522 U.S. at 343, 118 S.Ct. 789 and *Solem*, 465 U.S. at 472, 104 S.Ct. 1161).

IV.

The state appellants also seek rehearing on the ground that the court wrongly determined that lands within the former boundaries of the Yankton Sioux Reservation which were taken into trust under the Indian Reorganization Act are part of the reservation under § 1151(a). They argue that under 25 U.S.C. § 467, such reacquired lands cannot become part of a reservation unless the Secretary of the Interior has made a formal proclamation to that effect. Petitioners also claim that our decision conflicts with *United States v. Stands*, 105 F.3d 1565 (8th Cir.1997). As the United States points out, however, these contentions essentially recapitulate arguments already raised and correctly addressed on appeal. *See Podhradsky II*, 577 F.3d at 968-69.

As we have explained, 25 U.S.C. § 467 does not require a proclamation from the Secretary when that official "decides to add land to a preexisting reservation such as that of the Yankton Sioux." *Id.* at 969. Rather, the statute authorizes the Secretary both "to proclaim new Indian reservations . . . *or* to add such lands to existing reservations." *Id.* at 968-69. (*quoting* 25 U.S.C. § 467) (emphasis in original). Congress thus explicitly provided for land to be added to existing reservations without a proclamation. Because the IRA trust lands in this case were simply returned to an existing reservation, no proclamation was necessary to restore their reservation status.

Petitioners rely on *Stands* for the proposition that "tribal trust land beyond the boundaries of a reservation is ordinarily not Indian country." *Stands*, 105 F.3d at 1572. This argument was directly addressed in our decision. *See Podhradsky II*, 577 F.3d at 968 n. 13. The language in *Stands* on which petitioners rely is classic dicta. The question on which the case turned was not whether any trust lands were part of a reservation, but simply whether a particular plot of land was "an Indian allotment, the Indian title to which has not been extinguished." *Stands*, 105 F.3d at 1571. The *Stands* court neither considered nor decided matters bearing directly on the status of the IRA trust lands in this case.

The petitions for rehearing merely reiterate arguments related to the IRA trust lands which were already soundly rejected on appeal, and they consequently fail to satisfy the standards for panel rehearing.

V.

We turn finally to the pending motions. Despite over fifteen years of litigation and the voluminous record in this case, petitioners now seek to add more factual information in support of their petitions. To that end, the state appellants filed with their petition for rehearing six maps intended to illustrate the jurisdictional changes wrought at various stages of this litigation. Only two of these maps were previously in the record (maps D and E). The county

appellants also filed copies of each of these maps with their petition, along with an affidavit of Jo Ann Mazourek, the Director of Equalization for Charles Mix County, summarizing her examination of records relating to former allotments patented in fee after 1948.

On January 13, 2010 we granted the state appellants' motion to file a supplement to their petition containing a revised affidavit by Ms. Mazourek stating that 8,939.47 acres of land left allotted status and were patented in fee after the 1948 enactment of 18 U.S.C. § 1151, and Map G, which shows the locations of those fee parcels. Her affidavit also suggests that, based upon her assessment of whether the titleholder has an Indian name or not, over 90 percent of that fee land is not owned by Indians today.

The county appellants also moved on January 25, 2010 to file a supplemental petition for rehearing and for rehearing en banc. That supplemental petition included additional argument attacking the court's decision, copies of the revised Mazourek affidavit and Map G, 22 pages of quoted excerpts from various treatises and judicial opinions, and an excerpt from the transcript of the 1998 oral argument before the Supreme Court in *South Dakota v. Yankton Sioux Tribe*.

The Tribe argues that the maps and affidavits not in the record when the court reached its decision must be stricken. We agree. New factual material may be considered on a petition for rehearing only in

the rarest circumstances. *See Smith v. Armontrout,* 865 F.2d 1502, 1505 n. 5 (8th Cir.1988). This case falls within the rule, not the exception, particularly because the proposed new information concerns matters not decided by the court or necessary to its decision. Accordingly, maps A, B, C, F, and G, and the Mazourek affidavits should be stricken from the record.

The Tribe and the United States also argue that the county appellants' motion to file a supplemental petition for rehearing should be denied. The factual exhibits included with the county's supplemental petition were already filed by the state appellants with their supplement. Aside from those duplicative materials, the supplemental petition largely restates earlier arguments and seeks to buttress them with extensive unanalyzed quotations from legal texts. To the limited extent the supplemental petition offers new arguments, there is no apparent reason they could not have been included in the original petition. We see no reason to permit the filing of what amounts to an overlength petition more than two months after the already extended filing deadline. To do so would unnecessarily prolong this already extended process. The county appellants' motion should therefore be denied.

The Rosebud Sioux Tribe's motion for leave to file an amicus brief should be granted, just as were the motions of the amici supporting petitioners.

Finally, petitioners' April 2010 motion to enlarge their petitions must be denied. In that motion, petitioners argue that *City of Sherrill* supports both their disestablishment claim and their claim that former allotments patented in fee after 1948 are not part of the reservation. As to the first issue, the Tribe points out that the lands at issue in *City of Sherrill* were located in an area with less than one percent Indian population and out of Indian hands for some 200 years. *City of Sherrill,* 544 U.S. at 211, 216, 125 S.Ct. 1478.

We need not examine the significant differences between *City of Sherrill* and the present case in any detail because it is far too late for petitioners to present an entirely new theory in support of disestablishment. Petitioners have not previously relied upon that 2005 case, nor did they raise the equitable doctrines on which it relies in the district court, on appeal, or even in their petitions for rehearing. "Panel rehearing is not a vehicle for presenting new arguments," *Easley v. Reuss,* 532 F.3d 592, 593-94 (7th Cir.2008) (per curiam), and we do not ordinarily consider arguments raised for the first time in a petition for rehearing, *see In re Hen House Interstate, Inc.,* 177 F.3d 719, 724-25 (8th Cir.1999) (en banc). Petitioners have had years to develop their litigation strategy, and *City of Sherrill* was decided more than two years before the parties briefed the merits of the current dispute in the district court. Petitioners "can not now, after failing to prevail on [their] original theories, invoke an entirely new theory in support of"

their position. *United States v. Klotz*, 503 F.2d 1056, 1056 (8th Cir.1974) (per curiam). As for the post 1948 fee lands, their status was not part of our 1999 remand to the district court (or its decision) and was not determined in our 2009 decision and judgment. Petitioners' recent motion for a renewed remand to the district court thus seeks not only to raise a new argument, but entirely new claims related to a category of lands not at issue below or on appeal. It of course remains open to the parties to file new actions in the district court if they choose. A remand to the district court of issues beyond the scope of this lengthy litigation would be wholly inappropriate.

VI.

This order as well as the amended opinion will moot some issues in the current petitions for rehearing and rehearing en banc. All of the parties should therefore have the opportunity to file any new petitions within 45 days from the entry of this order and of the amended opinion.

VI.

For the foregoing reasons it is hereby ordered that:

(1) The petitions for panel rehearing are granted to the extent that the dicta discussed herein shall be stricken from the court's opinion filed in this case on August 25, 2009;

(2) The opinion filed in this matter on August 25, 2009 and reported at 577 F.3d 951 is withdrawn and our amended opinion shall be substituted and filed concurrently with this order;

(3) The Rosebud Sioux Tribe's motion for leave to file an amicus brief is granted;

(4) The motion of Charles Mix County for leave to file a supplemental petition for rehearing is denied;

(5) Maps A, B, C, F, and G, and the affidavits of Jo Ann Mazourek filed with the petitions for rehearing and the state appellants' supplement are stricken from the record; and

(6) PETITIONERS' MOTION FOR LEAVE TO AMEND THE PETITIONS FOR REHEARING IS DENIED. THE REQUESTS IN THE MOTION FOR DECISION IN PETITIONERS' FAVOR, REMAND, OR FURTHER BRIEFING ARE ALSO DENIED..

(7) Any new petitions for rehearing and rehearing en banc shall be filed within 45 days of the entry of this order and of the amended opinion.

577 F.3d 951

United States Court of Appeals,
Eighth Circuit.
YANKTON SIOUX TRIBE, and its individual members, Plaintiffs-Appellees/Cross-Appellants,
United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe,
Intervenor Plaintiff-Appellee,
v.
Scott J. PODHRADSKY, State's Attorney of Charles Mix County; C. Red Allen, member of the Charles Mix, South Dakota, County Commission; Keith Mushitz, member of the Charles Mix, South Dakota, County Commission; Sharon Drapeau, member of the Charles Mix, South Dakota, County Commission; M. Michael Rounds, Governor of South Dakota; Lawrence E. Long, Attorney General of South Dakota, Defendants-Appellants/Cross-Appellees,
Southern Missouri Waste Management District,
Interested Party.
Rosebud Sioux Tribe, Amicus on behalf of Appellees.
Nos. 08-1441, 08-1488.

Submitted: March 11, 2009.
Filed: Aug. 25, 2009.

Rebecca L. Kidder, Rapid City, SD, argued, for Appellee Yankton Sioux Tribe.

Mark E. Salter, Asst. U.S. Atty., Sioux Falls, SD, argued (Jan Leslie Holmgren, Asst. U.S. Atty., on the brief), Katherine Wade Hazard, U.S. Department of Justice, Washington, DC, for Intervenor Plaintiff-Appellee.

Tommy D. Tobin, Winner, SC, argued, for appellants Podhradsky, Allen, Mushitz, Drapeau and Southern Missouri Waste Management District.

John P. Guhin, Asst. Atty. Gen., Pierre, SD, argued (Meghan N. Dilges, Asst. Atty. Gen., on the brief), for appellants Long and Rounds.

Kenneth W. Cotton, Wipf & Cotton, Wagner, SD, on the brief, for Southern Missouri Waste Management District.

Terry L. Pechota, Pechota Law Office, Rapid City, SD, argued (Eric John Antoine, Rosebud Sioux Tribe, Rosebud, SD, on the brief), for Amicus on behalf of appellees.

Before MURPHY, MELLOY, and SHEPHERD, Circuit Judges.

MURPHY, Circuit Judge.

In this action the Yankton Sioux Tribe (Tribe) and its members sought declaratory and injunctive relief against officials of Charles Mix County[1] and the State of South Dakota[2] in respect to the boundaries of the Yankton Sioux Reservation. In an earlier stage of the case we held that the Tribe's 1894 cession of certain

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[1] Scott Podhradsky, state's attorney for Charles Mix County, and individual members of the county commission. During the course of this consolidated litigation, Podhradsky replaced Matt Gaffey as state's attorney and first named defendant.

[2] Governor Michael Rounds and Attorney General Lawrence Long.

land to the United States had diminished, rather than disestablished, the reservation and that some land retained reservation status. *Yankton Sioux Tribe v. Gaffey (Gaffey II)*, 188 F.3d 1010 (8th Cir.1999), *cert. denied*, 530 U.S. 1261, 120 S.Ct. 2717, 147 L.Ed.2d 982 (2000). We remanded to the district court for further development of the record and for "findings relative to the status of Indian lands which are held in trust." *Gaffey II*, 188 F.3d at 1030.

An earlier action had been filed by the Tribe against the Southern Missouri Waste Management District (Waste District), seeking a declaration that the 1858 boundaries of the reservation remained intact and that therefore a particular site at issue was subject to federal environmental regulation. After the Tribe prevailed in the district court and on appeal, *Yankton Sioux Tribe v. S. Mo. Waste Mgmt. Dist.*, 890 F.Supp. 878 (D.S.D.1995), *aff'd*, 99 F.3d 1439 (8th Cir.1996), the Supreme Court reversed. In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), the Supreme Court held that the Yankton Sioux Reservation had been diminished by the Tribe's cession of certain lands to the United States in 1894 and that the parcel at issue in the Tribe's dispute with the Waste District was not reservation land.[3] The Court remanded for

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[3] The Tribe has never dismissed its action against the Waste District which remains an inactive interested party, not having filed a notice of appeal. The district court observed that

(Continued on following page)

determination of the larger question of whether the Yankton Sioux Reservation had been disestablished or diminished.

On remand the original case was consolidated with this separate action against the county and state officials in which the Tribe seeks a declaratory judgment that all land not ceded to the United States in 1894 remains part of the Yankton Sioux Reservation under the jurisdiction of the Tribe and the federal government. The United States intervened on its own behalf and for the benefit of the Tribe. The district court ruled in favor of the Tribe, concluding that the reservation had not been disestablished but consisted of all land not ceded in 1894 as well as certain reserved "agency trust lands." *Yankton Sioux Tribe v. Gaffey (Gaffey I)*, 14 F.Supp.2d 1135 (D.S.D.1998). The defendants appealed, and we affirmed in part, reversed in part, and remanded for further proceedings, *Gaffey II*, 188 F.3d at 1030-31, holding that the reservation had been diminished rather than disestablished and that it included at least the agency trust lands, but reversing and remanding in other respects.

Now before our court are appeals filed by both sides from the judgment issued by the district court after additional proceedings on remand, *Yankton Sioux Tribe v. Podhradsky*, 529 F.Supp.2d 1040

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district representatives were present during the Podhradsky trial but had not played an active role after October 2004

(D.S.D.2007). The district court ruled that some 37,600 acres of trust land remained part of the reservation and that land continuously owned in fee by individual Indians also qualified as reservation. The county and state defendants appeal, and the Tribe, supported by the intervening United States, cross appeals. We affirm in part and vacate in part.

I.

The original boundaries of the Yankton Sioux Reservation were created by treaty between the Tribe and the United States on April 19, 1858, 11 Stat. 743 (1858 Treaty). In that treaty, the Tribe ceded more than 11,000,000 acres of land to the United States and reserved to itself approximately 430,400[4] acres in what is now Charles Mix County, South Dakota. The United States guaranteed to the Tribe "the quiet and peaceable possession of the said tract," 11 Stat. at 744, and agreed that, with certain exceptions, "[n]o white person . . . shall be permitted to reside or make any settlement upon any part of the tract herein reserved for said Indians," 11 Stat. at 747. The subsequent history of the Tribe and its reservation reflects

[4] Although the 1858 Treaty refers to 400,000 acres, a later survey concluded the reservation contained 430,405 acres at the time of the treaty. *See* Letter from the Commissioner of Indian Affairs to the Secretary of the Interior (Dec. 9, 1893), *reprinted in* S. Exec. Doc. No. 27, 53d Cong., 2d Sess., 1, 5 (1894) (Commissioner's Letter).

the changing policies of the federal government over the succeeding years.

In the first half of the nineteenth century, federal Indian policy focused on removing tribes from the eastern half of the country and relocating them on western lands, but by the time of the 1858 Treaty, "federal policy had shifted fully from removal to concentration on fixed reservations." *Cohen's Handbook of Federal Indian Law* § 1.03[6][a], at 65 (2005 ed.) (*Cohen*). These reservations were "envisioned as schools for civilization, in which Indians under the control of the agent would be groomed for assimilation." *Id.*

As the westward migration of white settlers accelerated following the Civil War, pressure grew to open Indian reservations for agricultural and resource development by the newcomers. Supporters of Indian assimilation argued that as more Indians adopted white customs and agricultural practices, their need for large tracts of reservation land would diminish, freeing vast areas for white settlement and development. This approach was formalized in the General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388 (repealed in part by Pub.L. No. 106-462 § 106, 114 Stat.1991, 2007 (2000)).

Under the Dawes Act, the executive branch was authorized to divide portions of Indian reservations into personally assigned allotments to be distributed to individual tribal members. *Id.* § 1, 24 Stat. at 388. The Secretary of the Interior was directed to issue

patents, under which the United States would hold title to the allotments in trust for twenty five years "for the sole use and benefit of the Indian to whom such allotment shall have been made." *Id.* § 5, 24 Stat. at 389. At the end of the trust period, allottees would take fee simple ownership of their individual plots, free of any restrictions against sale or alienation to non Indians. *Id.* Furthermore, once a reservation had been divided into allotments, the government was empowered to negotiate with the tribes for the purchase of unallotted surplus land and to open such areas to white settlement. *Id.*

The allotment policy in general and the Dawes Act in particular were intended to hasten the demise of the reservation system and to encourage Indian assimilation into the white system of private property ownership. "Within a generation or two, it was thought, the tribes would dissolve, their reservations would disappear, and individual Indians would be absorbed into the larger community of white settlers." *Yankton Sioux Tribe*, 522 U.S. at 335, 118 S.Ct. 789.

Acting under the authority of the Dawes Act, federal agents allocated to tribal members individual allotments comprising 167,325 acres of the then 430,405 acre Yankton Sioux Reservation. Another 95,000 acres were subsequently allotted to tribal members under the Act of February 28, 1891, 26 Stat. 794 (1891 Act). These tribal allotments, totaling approximately 262,300 acres, were not contiguous parcels of land. Rather, the individual allotments were scattered across the reservation and interspersed

with approximately 168,000 acres of unallotted surplus land. Commissioner's Letter at 5.

In 1892 a three member Yankton Indian Commission, which represented the Secretary of the Interior, traveled to the reservation to discuss the federal government's interest in acquiring the Tribe's surplus land. After lengthy negotiations, the Tribe agreed to sell all of the unallotted acreage to the United States for $600,000. The ceded land was then to be opened to white settlement, with the exception of roughly 1,000 acres specifically reserved for use by the United States for "agency, schools, and other purposes." Act of August 15, 1894, ch. 290, 28 Stat. 286, 316 (1894 Act). These set aside agency reserve lands were expected to be opened for white ownership at such time as they were no longer needed for the Tribe's support. *Id.* The Supreme Court has commented that the set aside of these agency lands is evidence that Congress envisioned an ongoing reservation despite the sale of the surplus lands. *Yankton Sioux Tribe,* 522 U.S. at 350, 118 S.Ct. 789.

Congress ratified the cession agreement by statute in the 1894 Act, and in May 1895 President Grover Cleveland issued a proclamation opening the ceded land to white settlement. In *Yankton Sioux Tribe* the Supreme Court ruled that the land ceded to the United States under the 1894 Act was thus no longer part of the Yankton Sioux Reservation but fully subject to the jurisdiction of South Dakota. 522 U.S. at 358, 118 S.Ct. 354. By the end of the nineteenth century federal Indian policy had therefore

reduced the Tribe's land holdings from a sizeable communal reservation to a checkerboard of individual allotments intermingled with white homesteads.

Subsequently Congress passed the Act of May 8, 1906, ch. 2348, 34 Stat. 182 (Burke Act), amending § 6 of the Dawes Act. The Burke Act gave the Secretary of the Interior the discretion to remove allotted land from trust status and to issue fee simple patents, either upon the death of an Indian allottee or upon a finding that an allottee was "competent and capable of managing his or her affairs." 34 Stat. at 183. Upon issuance of fee simple patents, such Indian owned land would then be freely alienable to white settlers. As a result of fee patents issued under the Burke Act, tribal allotments began passing into white hands well before the expiration of the original twenty five year trust period set by the Dawes Act. By 1930, tribal members held only 43,358 acres of land out of the more than 262,300 acres originally carved into Indian allotments.[5] Herbert T. Hoover, A Yankton

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[5] The Tribe argues that the Burke Act did not apply to allotments made on the Yankton Sioux Reservation and that therefore some 300 "forced fee patents" issued under it should be considered null and void The Tribe did not raise this argument until after the case was before the district court for the third time. As that court noted, "[t]here is a limit as to what should be undertaken . to determine reservation boundary issues that were not raised or addressed by this Court nor the superior courts. This issue . [is] beyond the scope of this litigation " *Yankton Sioux Tribe v Gaffey*, No CIV 98-4042, 2006 WL 3703274, at *3 (D S D Dec 13, 2006) (order identifying the issues to be considered on remand) We agree

Sioux Tribal Land History 5 (1995) (unpublished manuscript).

In 1916, recognizing the rapid erosion of the Tribe's allotted lands, President Woodrow Wilson issued an executive order extending by ten years the trust period on all but approximately 150 of the parcels still held in trust on the Yankton Sioux Reservation. Exec. Order No. 2363, Apr. 20, 1916. The trust periods were again extended in 1926 and 1929. Exec. Order No. 4406, Mar. 30, 1926; Exec. Order No. 5173, Aug. 9, 1929. In 1929 Congress also reconsidered the disposition of the roughly 1,000 acres of land which had been set aside for "agency, schools, or other purposes." Although the 1894 Act originally envisioned that these lands would be opened to white settlement once they had served their intended purposes, Congress decided instead to return them to the Tribe and specifically precluded any allotments on these parcels. Act of February 13, 1929, ch. 183, 45 Stat. 1167 (1929 Act).

During this period, the consequences of the allotment and assimilation policies became acutely obvious. The process of allotment and the liberalized issuance of fee patents under the Burke Act left many Indians landless and reduced once coherent communities to jurisdictional checkerboards, as is currently reflected in respect to the Yankton Sioux Reservation. *Cohen,* § 1.04, at 78. Moreover, "[t]he process of transforming Indian culture into white culture proved more difficult than placing an Indian name on allotted land deeds. . . . [T]he cultural resilience of the

American Indian amazed even the most dedicated reformer." *Id.* at 80.

By the early twentieth century, the forces behind allotment and assimilation were nearly exhausted, and federal policy was reoriented towards "new protections for Indian rights, support for federally defined tribalism, and encouragement of historical and anthropological concerns such as arts, crafts, native rituals, tourism, and traditional economic systems." *Id.* § 1.05, at 84. In time this new attitude led to the Indian Reorganization Act of 1934(IRA), ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. § 461 *et seq.*).

The IRA reflected a fundamental change in federal Indian policy. It prohibited further allotment of Indian lands and indefinitely extended the trust periods for outstanding allotments. The Act also authorized the Secretary of the Interior to acquire additional lands in trust – both on and off reservation – and either to proclaim these lands part of a new reservation or to add them to an existing one. Since the passage of the IRA, the government has taken almost 6,500 acres into trust for the benefit of the Yankton Sioux Tribe.

This tangled history, along with the inconsistent and sometimes contradictory policies pursued by the national government, has produced a confusing patchwork of land holdings and jurisdictional claims within the original 1858 boundaries of the reservation. For

ease of exposition, we have identified six general categories of land.

> (1) *Allotted Trust Lands:* lands allotted to members of the Tribe which have been continuously held in trust for the benefit of the Tribe or its members. This category includes allotments which were later transferred from individual to tribal control, so long as the trust status was maintained. The district court found 30,051.66 acres of land fit this description.[6]
>
> (2) *Agency Trust Lands:* lands ceded to the United States in the 1894 Act but reserved for "agency, schools, and other purposes" which then were returned to the Tribe according to the 1929 Act. The district court identified 913.83 acres of land within this category. We held this category of land to be part of the diminished Yankton Sioux Reservation in *Gaffey II,* 188 F.3d at 1030.
>
> (3) *IRA Trust Lands:* lands acquired by the United States in trust for the benefit of the Tribe pursuant to the IRA. The district court identified 6,444.47 acres of such land.
>
> (4) *Miscellaneous Trust Lands:* lands acquired by the United States in trust for the benefit of the Tribe other than pursuant to

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[6] In *Yankton Sioux Tribe* the Supreme Court mentioned 30,000 acres held in trust for individual Indians and 6,000 acres of "tribal lands." 118 S.Ct. at 796.

> the IRA. Approximately 174.57 acres fit within this category.
>
> (5) *Indian Fee Lands:* allotted lands later transferred in fee to individual Indians and which have never passed out of Indian ownership. The record does not identify lands which may fit this description.
>
> (6) *Non Indian Fee Lands:* lands ceded to the United States in the 1894 Act and subsequently opened to white settlement which have not been reacquired in trust; and nonceded lands originally allotted to tribal members but later transferred in fee to non Indians and never reacquired in trust.

Of these six categories, the first four may be generically referred to as "trust lands" and the last two as "fee lands."

The trust lands are spread across the site of the original 1858 reservation in a complex checkerboard pattern, intermingled with lands long since occupied by white homesteaders. As a result the Yankton Sioux trust lands are not neatly contained within a single continuous boundary. The defendants urge that this characteristic shows the reservation has ceased to exist, but they cite no authority which requires that a reservation consist of compact, contiguous lands. While the fractured configuration of the Yankton Sioux Reservation may not seem ideal to various parties, it is a historic artifact resulting from shifting federal policy. There was evidence at trial that the parties have long experience in dealing with this

historical reality. For example, defendant Scott Podhradsky, state's attorney for Charles Mix County, testified that local and federal officials have developed a respectful and productive working relationship despite the complex jurisdictional boundaries.

In short, the 11,000,000 acre domain once assigned to the Tribe was successively fragmented and dramatically reduced in size: first to roughly 430,400 acres in 1858 and then to 262,300 acres in 1894. The issues now before us include the status of some 37,600 acres held in trust. Whatever the size of the remaining reservation lands, there is evidence in the record that they have continuing relevance and importance to the Yankton Sioux Tribe as a touchstone linking tribal members with each other and with their common culture, history, and heritage.

II.

In September 1994 the Yankton Sioux Tribe commenced its civil action against the Waste District seeking to prove that the site of a proposed landfill was in fact located on the Yankton Sioux Reservation and was therefore subject to federal environmental regulations. The Waste District filed a third party complaint and added the State of South Dakota as a party. In 1995 the district court decided that the original reservation boundaries as established by the 1858 Treaty remained in force. *Yankton Sioux Tribe v. S. Mo. Waste Mgmt. Dist.*, 890 F.Supp. 878 (D.S.D.1995), *aff'd*, 99 F.3d 1439 (8th Cir.1996).

The Supreme Court reversed, holding that all lands which had been ceded to the United States pursuant to the 1894 Act had thereby lost reservation status and were returned to the public domain. The Court specifically reserved the question of whether the 1894 Act had disestablished the entire reservation or whether a diminished reservation continued to exist within the nonceded lands. *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998). It also observed that the Act's special treatment of the reserved agency trust lands was an indication that Congress intended some sort of continuing reservation. *Id.* at 350, 118 S.Ct. 789. The case was then returned to our court, and we remanded to the district court for further proceedings. *Yankton Sioux Tribe v. S. Mo. Waste Mgmt. Dist.*, 141 F.3d 798, 799 (1998).

On remand the district court consolidated the original case against the Waste District with this separate civil action brought by the Tribe against various state and county officials seeking injunctive and declaratory relief. The Tribe asserted that the Yankton Sioux Reservation had been diminished only by those lands ceded in the 1894 Act and that all other lands within the 1858 boundaries – that is, the 262,300 acres comprising the original allotted trust lands – remained part of the reservation regardless of their later disposition. The Tribe argued that such lands were therefore within the jurisdiction of the Tribe and the federal government. The United States successfully intervened on behalf of the Tribe. After

considering the parties' arguments, the district court held in favor of the Tribe and the government and declared that the Yankton Sioux Reservation continued to exist and consisted of the agency trust lands in addition to all other lands which had not been ceded in the 1894 Act. *Yankton Sioux Tribe v. Gaffey (Gaffey I)*, 14 F.Supp.2d 1135 (D.S.D.1998).

The defendants appealed, and this court affirmed in part, reversed in part, and remanded. *Yankton Sioux Tribe v. Gaffey (Gaffey II)*, 188 F.3d 1010 (8th Cir.1999), *cert. denied*, 530 U.S. 1261, 120 S.Ct. 2717, 147 L.Ed.2d 982 (2000). After examining the arguments of the parties and the record they had made, we held that the Yankton Sioux Reservation had not been disestablished by the cession of surplus lands or by other means. We also held that the reservation consisted of, at a bare minimum, those lands reserved by the 1894 Act to the United States for "agency, schools, and other purposes" and which had been subsequently returned to the Tribe by the 1929 Act. We reversed the judgment of the district court that all of the originally allotted lands continued to be part of the reservation. We concluded that those allotments which had passed out of Indian hands and into white ownership had ceased to be part of the reservation. Since the existing record was inadequate to determine the status of either the remaining trust lands or any fee lands owned by individual Indians, a remand was necessary. The remaining trust lands were comprised of allotments continuously held in trust for the Tribe or its members, as well as lands later taken

into trust by the United States for the benefit of the Tribe including those acquired pursuant to the 1934 Indian Reorganization Act.

In sum, in *Gaffey II* we held that the Yankton Sioux Reservation had not been disestablished but diminished, and that it consisted of at least the agency trust lands but did not include lands which had passed into white ownership. We remanded to the district court with instructions to develop the record and make findings relevant to the status of the remaining categories of land. All parties petitioned for en banc review, which was denied. *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. Dec. 8, 1999) (order denying petition for rehearing with petition for rehearing en banc). The Supreme Court denied certiorari. *Yankton Sioux Tribe v. Gaffey*, 530 U.S. 1261, 120 S.Ct. 2717, 147 L.Ed.2d 982 (2000).

On remand the parties conducted additional discovery, after which the district court conducted a two day trial and considered a voluminous set of historical documents and government reports, along with numerous spreadsheets and area maps relevant to the various land holdings in dispute. The district court then made findings of fact and conclusions of law, settling all the contested issues about reservation status in favor of the Tribe. The district court began by recognizing our *Gaffey II* holding, including that the agency trust lands which had been returned to the Tribe were part of a diminished Yankton Sioux Reservation. The district court then determined that all outstanding allotments which had maintained

their trust status – whether for the benefit of the Tribe in common or for individual members – continued to be part of the reservation. Next, the district court held that all lands taken into trust pursuant to the IRA were reservation land; the district court determined alternatively that this category of trust lands is at a minimum "de facto" reservation or a "dependent Indian community" subject to federal and tribal jurisdiction. Finally, the district court ruled that former allotments which were now owned in fee by tribal members were part of the reservation so long as such lands had never passed out of Indian ownership.

The district court also made several ancillary rulings. In particular, it held that, notwithstanding the Tribe's contrary assertion, a 1927 congressional enactment had not frozen the boundaries of the reservation. It further held that the 1934 IRA had frozen the boundaries, but that a subsequent 1948 measure ended that freeze. The district court also rejected a claim by the defendants that 3,201 acres of land allegedly taken into trust by the United States for the benefit of the Tribe were never formally accepted into trust status and therefore cannot be considered trust lands or reservation. The district court held that such a challenge to the trust status of the lands was barred by the United States' sovereign immunity and that such immunity had not been waived by the Quiet Title Act, 28 U.S.C. § 2409a.

The district court's final judgment decreed that the agency trust lands, outstanding allotments, IRA trust lands, and Indian owned fee lands continuously held in Indian hands qualified as reservation. It denied all other claims asserted by the parties. The final judgment did not incorporate the district court's alternative holdings, and it is from that judgment that appellants and cross appellants have taken their appeals.

On their appeal, the defendants challenge the district court's conclusions that the various trust lands are part of the Yankton Sioux Reservation, either formally or informally, or that such lands support a dependent Indian community. They also persist in asking us to reconsider *Gaffey II* and continue to argue, contrary to that decision, that the reservation has been completely disestablished and that even the agency trust lands lack reservation status. Finally, they contend that the district court erred in not considering their claim that the United States had failed formally to accept certain lands into trust. On its cross appeal, the Tribe objects to the district court ruling that the reservation boundaries are not frozen. The United States asks us to affirm the district court decision in its entirety. We review the findings of fact made by the district court in a bench trial for clear error and review de novo its legal conclusions and mixed questions of law and fact. *Eckert v. Titan Tire Corp.*, 514 F.3d 801, 804 (8th Cir.2008).

III.

Before we turn to review of the district court's findings and conclusions on remand, we must take up several preliminary issues raised there and argued again on appeal. First among these is the defendants' continuing challenge to our holding in *Gaffey II* that the Yankton Sioux Reservation had not been disestablished.

Gaffey II squarely held that the Yankton Sioux Reservation was never disestablished and that, although diminished, the reservation continues to exist and at a minimum consists of the agency trust lands reserved to the United States for "agency, schools, and other purposes" and later returned to the Tribe. These holdings were part of the law of the case remanded to the district court. The law of the case doctrine means "that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Gander Mountain Co. v. Cabela's, Inc.*, 540 F.3d 827, 830 (8th Cir.2008) (internal quotation marks omitted). The appellants have presented no persuasive reasons to revisit our holding in *Gaffey II*.

We observed in *Gaffey II* that the 1894 Act reserved the agency trust lands to the federal government for the purpose of providing "aid and education to tribal members so long as they were needed." *Gaffey II*, 188 F.3d at 1029. That provision is "strong evidence that a reservation was expected to remain in existence." *Id.* at 1027. Indeed, the Supreme Court

appeared to reach a similar conclusion in *Yankton Sioux Tribe*, commenting that it would be "'difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation.'" *Yankton Sioux Tribe*, 522 U.S. at 350, 118 S.Ct. 789 (quoting *Solem v. Bartlett*, 465 U.S. 463, 474, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984)). Based on the language of the 1894 Act and the negotiations between the Tribe and federal officials preceding it, we held in *Gaffey II* that these lands were part of an ongoing reservation. 188 F.3d at 1030.

Under the law of the case doctrine, "a decision in a prior appeal is followed in later proceedings unless a party introduces substantially different evidence, or the prior decision is clearly erroneous and works a manifest injustice." *United States v. Bartsh*, 69 F.3d 864, 866 (8th Cir.1995) (internal quotation marks omitted). The defendants have not met either of these conditions.

The defendants' new evidence introduced at the court trial on remand does not undermine our analysis in *Gaffey II*. They rely principally on testimony by a former official of the Bureau of Indian Affairs and an agent of the Federal Bureau of Investigation, both of whom said that they personally would exercise jurisdiction over agency trust land only so long as it was held in trust. Because these witnesses based their jurisdiction on the land's trust status as opposed to any reservation status, the defendants argue their testimony undermines the concept of a continuing

reservation. According to the trial transcript, these witnesses were never asked whether the agency trust land also qualifies as reservation land, and it is far from clear that their statements reflect a considered jurisdictional distinction between reservation land and various trust properties. More importantly, their testimony sheds little light on the intentions of either the nineteenth century parties who negotiated the agreement between the Tribe and the federal government or of the Secretary of the Interior in making decisions to add trust land to an existing reservation. The defendants also point to evidence that the agency trust lands are located on two distinct parcels and are not contiguous, which is not surprising given the checkerboard nature of the allotments.

It is not clear that any of the defendants' evidence was truly "new" in the sense that it could not have reasonably been developed and presented in earlier stages of this litigation. As another court pointed out in rejecting an attempt to challenge the law of the case with newly presented evidence, "[t]here is nothing in the record to indicate that the evidence produced at the hearing after remand was unavailable to the [litigants] during the first trial. [They] simply chose not to produce that evidence. They chose their trial strategy, litigated accordingly, and lost." *Baumer v. United States*, 685 F.2d 1318, 1321 (11th Cir.1982).

Most significantly, the rulings in *Gaffey II* have not been shown to be erroneous. They were based on an exhaustive analysis of the historical materials

surrounding the Tribe's agreement with the federal government and the 1894 ratification of that agreement, as well as the subsequent history. *Gaffey II*, 188 F.3d at 1021-28.[7] As already pointed out, the Supreme Court has indicated that the agency trust land provision of the 1894 Act suggests Congress envisioned an ongoing reservation. *Yankton Sioux Tribe*, 522 U.S. at 350, 118 S.Ct. 789. Clearly the defendants disagree with much of *Gaffey II*, "but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate of chances from changes in its members." *Roberts v. Cooper*, 61 U.S. (20 How.) 467, 481, 15 L.Ed. 969 (1857). The law of the case as determined in *Gaffey II* continues to control this matter, and the district court did not err by following our mandate that the reservation still exists even though diminished and that it includes the agency trust lands.

The defendants also argue that two parcels of the agency trust land, totaling 106 acres, were not within

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[7] The defendants rely on *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), a South Dakota Supreme Court decision released one day after *Gaffey II*. *Bruguier* was a habeas case dealing with the criminal jurisdiction status of a former allotment which had passed into white ownership (a category of land which *Gaffey II* held was not part of a diminished reservation). *Bruguier*'s conclusion that the Yankton Sioux Reservation had been disestablished in 1894 was more sweeping than necessary for resolution of the matter at issue, and none of the parties to this litigation participated in that case.

the scope of the 1929 Act which returned the balance of the agency trust lands to the Tribe. These two parcels were conveyed by fee patents to the Chapter of Calvary Cathedral Episcopal Church in 1897 and in 1920. They were thus owned by that church when Congress directed in 1929 that the agency trust lands be returned to the Tribe, rather than be opened for white settlement once they were no longer needed for their intended purposes. The defendants argue that because these 106 acres were in private hands at the time of the 1929 Act, they were not within the Act's purview and are thus outside of *Gaffey II*'s holding that agency trust land "reserved to the federal government . . . and then returned to the Tribe continues to be a reservation." 188 F.3d at 1030. Whether the 1929 Act would have applied to these lands is moot, for in 1944 and 1945 the church returned these lands to the United States to be held in trust for the Yankton Sioux Tribe. They thus comfortably fit within the holding of *Gaffey II* and are reservation land under the controlling law of this case.

IV.

We now turn to the jurisdictional questions at the heart of this case. Reservation land is by definition "Indian country," and as a general rule Indian country falls under the primary civil, criminal, and regulatory jurisdiction of the federal government and the resident Tribe rather than the states. *See Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n. 1, 118 S.Ct. 948, 140 L.Ed.2d 30

(1998). Reservation status is not the only way to qualify as Indian country. Today the definition of Indian country is found in by 18 U.S.C. § 1151 which was enacted in 1948 and reads in pertinent part as follows:[8]

> [T]he term "Indian country" . . . means **(a)** all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, **(b)** all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and **(c)** all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Prior to the enactment of § 1151, the evolving concept of Indian country had mainly been developed and refined by the courts in their attempts to stay abreast of changing conditions in the American West and in federal Indian policy. *See Cohen*, § 3.04[2][b], at 184-88.

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[8] Section 1151 was originally enacted to define criminal jurisdiction, but its definition of Indian country is widely recognized to apply to civil matters as well. *See Venetie*, 522 U.S at 527, 118 S.Ct. 948

Congress reentered the debate in 1948 by adopting § 1151, Act of June 25, 1948, ch. 645, 62 Stat. 683, 757, but the statute mainly codified earlier Supreme Court decisions regarding Indian country. The language in § 1151(b) is taken almost verbatim from the Court's conclusion in *United States v. Sandoval,* 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913), that the federal government has a "duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State." *Id.* at 46. Likewise, § 1151(c) affirms the Court's holdings in *United States v. Pelican,* 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1914), and *United States v. Ramsey,* 271 U.S. 467, 46 S.Ct. 559, 70 L.Ed. 1039 (1926), that allotments constitute Indian country and fall within the jurisdiction of the federal government and the resident tribes.

Section 1151(a) confirms that reservations are properly considered Indian country and are therefore under the primary jurisdiction of the federal government and the relevant tribes. In this sense it is in accord with such cases as *Bates v. Clark,* 95 U.S. 204, 24 L.Ed. 471 (1877), and *Donnelly v. United States,* 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913). However, the enactment of § 1151(a) added an important twist to the nature of reservation land. According to its terms, reservation land remains Indian country "notwithstanding the issuance of any patent."

Section 1151(a) thus explicitly separates the concept of jurisdiction from the concept of ownership, and in so doing Congress superceded prior case law. For example, *Clairmont v. United States*, 225 U.S. 551, 32 S.Ct. 787, 56 L.Ed. 1201 (1912), had held that land "was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country. . . ." *Id.* at 558, 32 S.Ct. 787 (quoting *Bates*, 95 U.S. at 208). Section 1151(a) abrogated this understanding of Indian country and, with respect to reservation lands, preserves federal and tribal jurisdiction even if such lands pass out of Indian ownership. *See Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357-58, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962) (concluding that under § 1151(a) reservation status applies even when land is purchased by a non Indian); *see also Solem*, 465 U.S. at 468, 104 S.Ct. 1161 ("Only in 1948 did Congress uncouple reservation status from Indian ownership. . . .").

A.

Having ruled in *Gaffey II* that the Yankton Sioux Reservation had not been disestablished, we remanded for the district court to consider, among other matters, the status of allotted trust lands which had retained their trust status. All sides to this litigation acknowledge, as they must, that such lands qualify at the very least as Indian country under § 1151(c),

which explicitly identifies allotments as such. The disputed issue is whether these allotments are also part of the Yankton Sioux Reservation and therefore also qualify as Indian country under § 1151(a).

The distinction is important since lands which qualify only under § 1151(c) would lose their Indian country status if their governing trusts were ever terminated or revoked. If these lands also qualify as reservation, however, their Indian country status would be considerably more durable. Under § 1151(a) reservation lands retain their status "notwithstanding the issuance of any patent," including a patent which terminated a trust and conveyed the land in fee simple. After considering the evidence at trial, the district court held that the allotments were indeed part of an ongoing reservation and qualified as Indian country under § 1151(a).

The Supreme Court held in *Solem* that "[o]nce a block of land is set aside for an Indian reservation . . . the entire block retains its reservation status until Congress explicitly indicates otherwise." 465 U.S. at 470, 104 S.Ct. 1161. Furthermore, as we noted in *Gaffey II*, congressional "[i]ntent to diminish or disestablish a reservation must be 'clear and plain.'" 188 F.3d at 1021 (quoting *United States v. Dion*, 476 U.S. 734, 738, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986)). While the 1894 Act clearly expressed Congress's intention to sever the ceded surplus lands from the reservation, *Yankton Sioux Tribe*, 522 U.S. at 357-58, 118 S.Ct. 789, Congress never expressed a similar intention with respect to the allotted lands. The

simple act of dividing the Yankton Sioux Reservation into individual allotments was insufficient to divest the allotted lands of their reservation status.

Prior to the expiration of the trust period, the allotted lands "remained Indian lands set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings, the Government retaining control." *Pelican,* 232 U.S. at 449, 34 S.Ct. 396; *see also Mattz v. Arnett,* 412 U.S. 481, 496, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973) (holding that the policy of the Dawes Act "was to continue the reservation system and the trust status of Indian lands"); *United States v. Celestine,* 215 U.S. 278, 287, 30 S.Ct. 93, 54 L.Ed. 195 (1909) ("It is clear that the allotment alone could not [revoke the reservation].") (quoting *Eells v. Ross,* 64 F. 417, 419-20 (9th Cir.1894)). Furthermore, the Tribe's willingness to cede to the United States its *unallotted* lands does not indicate that the reservation status of *allotted* lands was also revoked. *Yankton Sioux Tribe,* 522 U.S. at 356, 118 S.Ct. 789 ("[W]e have repeatedly stated that not every surplus land Act diminished the affected reservation."). More importantly, there is no indication in the historical record that either Congress or the Tribe expressly intended to eliminate the reservation status of the Yankton allotted lands immediately upon allotment or upon the sale of the Tribe's surplus holdings.

It is clear from the circumstances surrounding the Tribe's agreement to sell its surplus lands that

the Tribe did not intend to relinquish immediate jurisdiction over the allotments and that it would not be required to part with them. In the discussions leading up to the agreement, a government negotiator explained to tribal members that

> [the Great White Father] wants to give you a chance to sell your surplus lands. . . . *He has told us to tell you that you will not be forced to part with your lands unless you want to. . . . He does not want you to sell your homes that he has allotted to you. He wants you to keep your homes forever.*

Council of the Yankton Indians (Oct. 8, 1892), *transcribed in* S. Exec. Doc. 27, 53d Cong., 2d Sess., 47, 49 (1894) (emphasis added). These reassurances acquire particular significance in light of the longstanding rule that an agreement between the United States and an Indian tribe should be "construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979) (quoting *Jones v. Meehan*, 175 U.S. 1, 11, 20 S.Ct. 1, 44 L.Ed. 49 (1899)).

In their report on the outcome of their negotiations with the Tribe, the federal commissioners wrote that "the purchase of the surplus lands was but a small part of our mission and of minor importance to both the Indians and the Government, the provisions connected therewith for the future welfare of the

Indians being of greater importance. . . ." Report of the Yankton Indian Commission (Mar. 31,1893), *reprinted in* S. Exec. Doc. No. 27, 53d Cong., 2d Sess., 7, 17 (1894). In particular, the Tribe was anxious to insure that annuity payments from the federal government would continue uninterrupted. The historical evidence thus reveals that the Tribe, while willing to sell its surplus, was concerned with maintaining a presence on the allotted lands and preserving the support of the federal government and its superintendence over those lands.

The final agreement, as ratified in the 1894 Act, reflects this understanding. As already noted, the Act set aside the agency trust land specifically to support the Tribe, a provision which the Supreme Court found "counsels against finding the reservation terminated." *Yankton Sioux Tribe*, 522 U.S. at 350, 118 S.Ct. 789. Furthermore, the statute ratifying the parties' agreement guaranteed to the Indian allottees the "undisturbed and peaceable possession of their allotted lands" as well as "all the rights and privileges of the tribe." 1894 Act, 28 Stat. at 317.

Simply stated, there is nothing in the historical and documentary record to indicate a congressional intent to terminate the reservation status of the allotted lands immediately upon ratification of the 1894 Act or the opening of the ceded territory to white settlement. In the absence of such an intention, we must conclude that at the time of the Act those lands retained the same reservation status they had enjoyed since the original 1858 Treaty. Even if Congress

had foreseen an eventual end to the reservation, one which would perhaps be hastened by the allotment policy,[9] such an expectation would not have been at odds to the nineteenth century mind with the ongoing maintenance of a reservation on the allotted lands. The fact that tribal members maintained beneficial property interests in the allotments is further evidence that the reservation status of those lands was preserved since at the time Indian land ownership was synonymous with reservation status. *See, e.g., Solem*, 465 U.S. at 468, 104 S.Ct. 1161 ("The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century.").

In the course of setting out the twists and turns in the federal policy regarding tribal lands, *Gaffey II* recounted Congress's original expectation that allotments would lose their reservation status as they passed out of Indian ownership and into white hands. 188 F.3d at 1028. That original concept was not inconsistent with the maintenance of reservation status for the allotted lands so long as they are held in trust. The defendants claim that because allotments lost their Indian country status when they

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[9] It is worth noting that the eventual expiration of the allotments was never a foregone conclusion. The Dawes Act allowed the president to extend the allotment period, which Presidents Wilson, Coolidge, and Hoover each did. The allotments were then indefinitely extended under the 1934 Indian Reorganization Act.

passed out of Indian hands, they cannot be reservation under § 1151(a) since under that subsection the Indian country status of reservation land is unaffected by ownership. The flaw in the defendants' argument is its attempt to interpret congressional and tribal intentions around 1892 through the modern lens of § 1151. As previously discussed, the 1948 enactment of § 1151(a) introduced a new understanding of Indian country which for the first time separated Indian ownership from reservation status. *See Solem*, 465 U.S. at 468, 104 S.Ct. 1161. As we noted in *Gaffey II*, this concept "would have . . . been quite foreign" to the parties who negotiated the 1892 agreement between the Tribe and the government, and it is their intentions and not the current statutory regime that "we must look to here." 188 F.3d at 1022.

To summarize, the 1892 agreement, and the 1894 Act which ratified it, expressed no clear congressional intent to divest allotted lands of their reservation status, and in the absence of such intent their reservation status was preserved. During that period, however – and continuing until the 1948 passage of § 1151 – prevailing law linked reservation status with Indian ownership. On this basis, we held in *Gaffey II* that allotments which passed into white hands lost their reservation status. Section 1151 altered the old understanding and gave a previously unimagined durability to reservation land by separating jurisdiction from ownership. Thus, while prior to 1948 an allotment on reservation land would have ceased to

be Indian country upon its sale to white owners, that is no longer the case today.[10]

The alleged inconsistency between our holding in *Gaffey II* (allotments lost reservation status upon sale to whites) and the district court's determination that allotments are reservation under § 1151(a) (reservation status is unaffected by sale) is nothing of the sort. It merely reflects the evolution of federal Indian policy and the defendants' anachronistic attempt to force a nineteenth century agreement into the mold of current legal principles.[11] The district court did not err when it concluded that all outstanding allotted lands continue to be reservation and qualify as Indian country under § 1151(a).

B.

On remand the district court was also asked to consider the status of lands taken into trust by the

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[10] It is unclear from the record whether any allotments have been patented in fee since 1948 and subsequently sold to white owners. If such lands exist, however, they would continue to be Indian country under the clear terms of § 1151(a). The holding in *Gaffey II* that lands which passed into white ownership lost reservation status thus only applies to pre 1948 conveyances.

[11] As already discussed, the origins of the checkerboard pattern of the Yankton Sioux Reservation lie in the federal government's former allotment policies and its liberal issuance of fee patents under the Burke Act.

federal government pursuant to the Indian Reorganization Act. The district court concluded that when lands which were once part of the original 1858 reservation were taken into trust under the IRA, they reacquired reservation status. It identified 6,444.47 acres of such land and classified them as Indian country under § 1151(a). The defendants appeal this holding while the Tribe and the United States support it.[12]

Congress passed the IRA in 1934, authorizing the Secretary of the Interior "to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians." IRA § 5, 25 U.S.C. § 465. The purpose of the Act was to further the independence of tribes and strengthen their ability to govern themselves. *See Cohen*, § 1.05, at 86 (The IRA was meant "to encourage economic development, self-determination, cultural pluralism, and the revival of tribalism."). Its provisions are

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[12] The defendants also claim that the United States failed formally to approve some 29 deeds conveying land in trust. These deeds affect approximately half of the IRA trust lands. The defendants argue that since the deeds were recorded without a formal acceptance by the government, the lands conveyed by them are not validly held in trust and cannot qualify as Indian country under any portion of § 1151. As the district court observed, "this case involves jurisdiction issues and does not affect title to real estate." *Podhradsky*, 529 F.Supp.2d at 1043. It pointed out that the federal government's sovereign immunity was not waived by the Quiet Title Act, 28 U.S.C. § 2409a (specifically exempting "trust or restricted Indian lands" from a more general waiver of immunity).

meant "to stabilize the tribal land base," *Nichols v. Rysavy*, 809 F.2d 1317, 1323 (8th Cir.1987), and to that end the legislation was "designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and *repurchase of former tribal domains*." *Cohen*, § 1.05, at 86 (emphasis added).

The defendants argue that taking land into trust for the benefit of an Indian tribe is insufficient to convert such land into Indian country, but their position runs contrary to well settled precedent. As the Supreme Court has recognized, "[s]ection 465 provides the proper avenue for [a tribe] to reestablish sovereign authority over territory. . . ." *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 221, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005). This court has also acknowledged that land held in trust under § 465 is effectively removed from state jurisdiction. In *Chase v. McMasters*, 573 F.2d 1011 (8th Cir.1978), we noted that when Congress enacted § 465 "it doubtless intended and understood that the Indians for whom the land was acquired would be able to use the land free from state or local regulation or interference as well as free from taxation." *Id.* at 1018.[13] *See also*

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[13] The defendants point to dictum in *United States v. Stands*, 105 F.3d 1565 (8th Cir.1997), that "tribal trust land beyond the boundaries of a reservation is ordinarily not Indian country." *Id.* at 1572. The issue in *Stands* was whether a particular parcel of land was or was not an allotment; the parties made no argument regarding the Indian country status of trust lands since that issue was irrelevant. *Id.* at 1572 n. 3. Even so,

(Continued on following page)

United States v. Roberts, 185 F.3d 1125, 1131 (10th Cir.1999) ("[L]ands owned by the federal government in trust for Indian tribes [under § 465] are Indian country pursuant to 18 U.S.C. § 1151."); *Langley v. Ryder*, 778 F.2d 1092, 1095 (5th Cir.1985) ("[W]hether the lands [acquired pursuant to § 465] are merely held in trust for the Indians or whether the lands have been officially proclaimed a reservation, the lands are clearly Indian country.").

The Tribe and the United States assert that when former reservation land is reacquired in trust under the IRA it is not just Indian country, but a particular *type* of Indian country, namely reservation within the meaning of § 1151(a). The difference is important because Indian country under § 1151(a) has the distinct property of retaining its status "notwithstanding the issuance of any patent." In other words, such land remains part of the reservation even if sold. The defendants argue, however, that the Yankton IRA trust lands do not qualify as reservation under § 1151(a) because the Secretary of the Interior has not issued a formal proclamation to that effect. They rely on § 7 of the IRA, 25 U.S.C. § 467, which provides that the Secretary "is . . . authorized to proclaim new Indian reservations on lands acquired . . . or to add such lands to existing reservations" (emphasis added).

Stands acknowledged that "[i]n some circumstances, off-reservation tribal trust land may be considered Indian country." *Id*

While there is no doubt that § 467 requires a proclamation when the Secretary wishes to establish a new reservation, the statute does not state that a proclamation is required when the Secretary decides to add land to a preexisting reservation such as that of the Yankton Sioux. Congress left the decision to the Secretary, authorizing the Secretary "to proclaim new Indian reservations . . . *or* to add such lands to existing reservations." *Id.* (emphasis added). The statutory language does not itself require a proclamation in the case of preexisting reservations, and the "cardinal canon" of statutory interpretation is "that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). By taking former Yankton Sioux Reservation lands back into trust under the IRA, the Secretary effectively exercised his authority to consolidate the Tribe's land base by restoring reservation status to former pieces of a reservation in existence since 1858.

When § 467 was drafted in 1934, the concept of Indian country lacked the benefit of § 1151's precise definition. Fine distinctions between reservation land, trust land, allotted land, dependent Indian communities, and the like would have carried little practical weight since jurisdiction was at the time essentially synonymous with Indian ownership. It would therefore have made sense for the congressional drafters of § 467 to provide for the Secretary to distinguish by means of a proclamation between

acquisitions of land intended to create a new reservation and acquisitions of land simply to be held in trust. Land held in trust by the federal government for addition to an existing Indian reservation would have been perceived as under federal jurisdiction even without a proclamation.

The IRA "was designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and *repurchase of former tribal domains.*" *Cohen,* § 1.05, at 86 (emphasis added). Indeed, a principle motivation for the IRA was to "permit progress toward the consolidation of badly checkerboarded Indian reservations." 78 Cong. Rec. 11,730 (1934) (statement of Rep. Howard). In keeping with that legislative intent, the Secretary made the decision to reacquire land in trust which had been formerly recognized as part of an existing reservation, the Yankton Sioux Reservation. This is entirely different from acquisition of land never previously recognized as under Indian jurisdiction. When the Secretary proclaims an intent to reincorporate trust land as a new reservation, it serves to give notice to all of a significant change in condition.

The parties most directly affected by a trust acquisition – the United States as trustee and the Tribe as beneficiary – both agree that the Secretary's decision to take former Yankton Sioux Reservation land into trust was sufficient to restore that land to its previous reservation status. The Secretary has

preeminence in interpreting laws under the Department's jurisdiction, *Tang v. INS*, 223 F.3d 713, 719 (8th Cir.2000) (according "substantial deference to the agency's interpretation of the statutes and regulations it administers"), and has never seen it necessary to issue a proclamation in respect to the Yankton IRA trust lands despite this extended litigation. The interests of the defendants are protected by administrative procedures in the Department of the Interior in which trust acquisitions are balanced against a multitude of factors, including "[j]urisdictional problems and potential conflicts of land use." 25 C.F.R. § 151.10(f).

The regulations reflect that the acquisition of former reservation land is likely to pose fewer problems than an acquisition of land which has no historical connection to a tribe's land base. Current regulations treat trust acquisitions of former reservation lands as an "on reservation" rather than an "off reservation" transactions, *see* 25 C.F.R. § 151.2(f) (defining reservation to include "that area of land constituting the former reservation"), and subject them to less searching scrutiny. For example, if a tribe requests an off reservation acquisition – that is, one involving land which is not nor ever has been part of a reservation – the regulations require the Secretary to consider "[t]he location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation." 25 C.F.R. § 151.11(b). If off reservation land is being acquired for business purposes, "the tribe shall provide a plan

which specifies the anticipated economic benefits." *Id.* § 151.11(c). Such regulations are consistent with our own analysis that restoration through the IRA of territory historically part of the Yankton Sioux Reservation is distinguishable from the acquisition of lands never within Indian domain and may be accomplished without a proclamation.

Moreover, the defendants can cite no statutory language or case law making an official proclamation necessary before former reservation lands can reacquire their reservation status. The only case they point to involved the establishment of a new reservation, not the return of former reservation land to an existing one, and is thus inapposite. *See Citizens Exposing Truth about Casinos v. Kempthorne,* 492 F.3d 460 (D.C.Cir.2007).

The defendants also argue that treating trust acquisitions of former reservation land differently from other acquisitions would grant significance to the 1858 boundaries despite the Supreme Court's determination in *Yankton Sioux Tribe,* and our own conclusion in *Gaffey II,* that the original boundaries have been altered by the reservation's diminishment. While it is true that the original 1858 boundaries are no longer markers dividing jurisdiction between the Tribe and the state, that does not mean to say they have lost their historical relevance for the Secretary's discretionary acts. Defendants argue that the IRA's legislative history, the Department of the Interior's internal guidelines, and the *Cohen* handbook stand for the proposition that some official action beyond

the acquisition of land is necessary when adding trust land to an existing reservation.

Here, the lands under consideration were part of this tribe's 1858 reservation and have been reacquired in trust "for the purpose of providing land for Indians." 25 U.S.C. § 465. We believe this presents a distinct question, one which the sources cited by the defendants simply do not resolve. There is a fundamental difference between acquiring land which has no historical connection to an existing reservation and reacquiring land which once formed part of a Tribe's land base. While Congress has provided that an official proclamation by the Secretary is necessary for adding such unrelated land to a reservation, it has not required it for the latter. The district court did not err in its conclusion that all lands taken into trust by the Secretary under § 465 within the jurisdiction of the Yankton Sioux Reservation and qualify as Indian country under § 1151(a).

C.

Although the district court identified 174.57 acres of miscellaneous land acquired in trust other than under the IRA, it did not directly address the status of these miscellaneous lands. Its separate discussion of dependent Indian communities was broad enough to cover all trust properties, however, including the miscellaneous plots.

In *Venetie* the Supreme Court noted that it had not yet "had an occasion to interpret the term

'dependent Indian communities'" as the term is used in § 1151(b). 522 U.S. at 527, 118 S.Ct. 948. In construing the term for the first time, the Court held that "it refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements – first, they must be set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." *Id.*

The miscellaneous trust lands easily meet this definition. The lands were acquired for the use and benefit of the Yankton Sioux Tribe, and the district court found that the federal Bureau of Indian Affairs "negotiates the leases, collects the rents and distributes the rents according to tribal status reports" with respect to these lands. *Gaffey I*, 529 F.Supp.2d at 1055. Testimony by a Federal Bureau of Investigation agent confirmed that the federal government exercises criminal jurisdiction over these trust lands. *Id.* This is more than enough to meet the standard for Indian country under § 1151(b). *See, e.g., Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (concluding that "property . . . held by the Federal Government in trust for the benefit" of a tribe qualifies as Indian country).

The defendants argue that the federal government's administration of these lands in trust is insufficient to meet the Supreme Court's definition of dependent Indian communities as it was announced and applied in *Venetie*. That case involved lands held

under the Alaska Native Claims Settlement Act (ANCSA), Pub.L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. § 1601 *et seq.*). ANCSA was specifically "intended to avoid a 'lengthy wardship or trusteeship.'" *Venetie*, 522 U.S. at 533, 118 S.Ct. 948. As the Court observed, ANCSA explicitly eliminated the Venetie Reservation and transferred the lands "to private, state-chartered Native corporations, without any restraints on alienation or significant use restrictions, and with the goal of avoiding 'any permanent racially defined institutions, rights, privileges, or obligations.'" *Id.* at 532-33, 118 S.Ct. 948. The land at issue in *Venetie* thus had virtually no resemblance to the Yankton Sioux trust land. Conveyance of the latter remains subject to the Secretary's oversight and approval, and the government continues to hold title to the land in trust, to administer leases on it, and to provide law enforcement services on it.

Consequently, we conclude that the miscellaneous trust lands at issue in this case qualify as dependent Indian communities and are Indian country under § 1151(b).

D.

The Tribe and the United States also urge us to uphold the district court's determination that former allotments which have been continuously held in fee

by Indian owners constitute reservation land. The defendants seek reversal.[14]

Although we might assume that such lands exist, the record does not identify any or their relevant histories. We therefore conclude that this issue is not ripe for resolution. "The ripeness doctrine flows both from the Article III 'cases' and 'controversies' limitations and also from prudential considerations for refusing to exercise jurisdiction." *Neb. Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1037 (8th Cir.2000). In *Nebraska Public Power District*, we held that "to resolve an issue lacking factual development simply to avoid a threatened harm would be to favor expedition over just resolution." *Id.* at 1039.

Here, a number of potentially important facts are missing with respect to Indian owned fee lands continuously held by tribal members. To start, no one has identified which, if any parcels, fit within this category. Moreover, the status of such lands may depend on a number of unknown factors, including whether the lands passed into fee ownership before or after the enactment of § 1151(a)'s provision

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[14] The defendants maintain that our mandate in *Gaffey II* limited the district court to an analysis of trust lands. This is incorrect, for we noted that the record then before us was insufficient to address the issue of fee lands continuously held in Indian ownership, 188 F.3d at 1030, and remanded "for further proceedings consistent with this opinion," *id.* at 1031. There was no explicit or implicit instruction limiting the district court to consideration of trust lands.

separating reservation status from ownership, whether the allotments expired at the natural end of the trust period, whether the fee patents were issued at the request of allottees, or whether the fee patents were "forced" on allottees pursuant to the Burke Act. After deciding that this category of land remained reservation, the district court noted that many of these historical facts could be developed by consulting "the land title records maintained by the BIA's Realty Office." *Podhradsky*, 529 F.Supp.2d at 1056-57. Such facts are currently absent in the record before us, and general conclusory descriptions do not clarify who can exercise jurisdiction over an area. Without the benefit of a fully developed record on these issues, we decline to consider this question and accordingly vacate that portion of the district court's decision and judgment.

E.

The Tribe further asserts that two Congressional enactments – the Act of March 3, 1927, § 4, ch. 299, 44 Stat. 1347 (codified as amended at 25 U.S.C. § 398d) (1927 Act), and the 1934 IRA – froze the boundaries of the reservation. Consequently, it argues, any lands alienated in fee to whites during the effective period of any such freeze should be considered part of the reservation. The district court determined, however, that the 1927 Act does not apply to the Yankton Sioux Reservation and that whatever freeze the IRA may have imposed was lifted by the Supervised Sales Act, ch. 293, 62 Stat. 236 (1948) (codified at 25 U.S.C. § 483) (Sales Act). The United

States and the defendants ask us to uphold the district court rulings on these issues.

With respect to the 1927 Act, the Tribe maintains that the statute prohibited alterations to the boundaries of any Indian reservation except by act of Congress. The defendants respond that the plain terms of the 1927 Act limit its application to reservations created by executive action rather than by treaty. The district court agreed with the defendants and concluded that the statute was inapplicable in the current dispute.

By the mid nineteenth century, Presidents "had begun to withdraw public lands from sale by executive order for the specific purpose of establishing Indian reservations." *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 325, 62 S.Ct. 1095, 86 L.Ed. 1501 (1942). Although there were initial questions about the legitimacy of these "executive order" reservations, any doubts were removed by *United States v. Midwest Oil Co.*, 236 U.S. 459, 35 S.Ct. 309, 59 L.Ed. 673 (1915), in which the Supreme Court held that the President has the power to withdraw lands from the public domain even in the absence of express statutory authority. These executive order reservations are nonetheless distinguishable from those created by treaty or by act of Congress.

The language of the 1927 Act does indeed limit its application to executive order reservations: "[H]ereafter changes in the boundaries of reservations created by *Executive* order, proclamation, or

otherwise for the use and occupation of Indians shall not be made except by Act of Congress. . . ." 44 Stat. at 1347 (emphasis added). The natural meaning of this language is that it applies only to reservations created by the executive branch, whether by executive order, executive proclamation, or other executive action, and *Sioux Tribe of Indians* recognizes as much. 316 U.S. at 325 n. 6, 62 S.Ct. 1095 ("In 1927, Congress added a provision that any future changes in the boundaries of *executive order reservations* should be made by Congress alone." (emphasis added)). The Yankton Sioux Reservation was created by the 1858 Treaty, is not an executive order reservation, and is therefore outside the freeze contemplated by this statute.

The Tribe also argues that the 1934 IRA froze the reservation's boundaries. Section 2 of that act indefinitely extended the trust period for all outstanding allotments, 48 Stat. at 984 (codified at 25 U.S.C. § 462), while § 4 states that "[e]xcept as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands . . . shall be made or approved. . . ." *Id.* at 985 (codified as amended at 25 U.S.C. § 464). The district court concluded that these provisions effectively froze any further diminishment of the Yankton Sioux Reservation, but it also concluded that the Supervised Sales Act, ch. 293, 62 Stat. 236 (1948) (codified at 25 U.S.C. § 483) (Sales Act), lifted whatever freeze was imposed. *See Oglala Sioux Tribe*, 708 F.2d at 330-31 (concluding that the Sales Act lifted restrictions).

We have never squarely confronted the effect of the IRA on the Secretary's authority under the Burke Act to issue fee patents to "competent" allottees, thereby removing trust restrictions on the alienation and conveyance of Indian lands. However, in *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. Hallett*, 708 F.2d 326 (8th Cir.1983), we assumed without deciding that the IRA had effectively frozen the Secretary's ability to issue fee patents. *Id.* at 330. In the same case, we also determined that the Sales Act had lifted any such freeze. *Id* at 330-31.

The Tribe argues that allotments on the Yankton Sioux Reservation were unaffected by the Sales Act since they had been granted under the Dawes Act and the 1891 Act, not under the IRA. While it is true that by its terms the Sales Act applies to allotments "held . . . under" the IRA, 25 U.S.C. § 483, we concluded in *Oglala Sioux Tribe* that by extending indefinitely the trust periods of previously awarded allotments, the IRA brought within its protection even allotments awarded prior to its enactment. 708 F.2d at 331. In other words, the Yankton Sioux allotments, although originally granted under the Dawes Act and the 1891 Act, would have expired but for the IRA's extension of the trust period. That is enough for them to be "held . . . under" the IRA. "[T]he allotments would not be 'held' . . . at all without the Indian Reorganization Act." *Id.* Since the trust periods on the Yankton allotments would have expired but for the IRA, they are "held" under that statute and any freeze imposed on their conveyance was lifted by the Sales Act.

The Tribe argues that even if the Sales Act did undo an IRA imposed freeze, land conveyances in fee to whites during the effective period of the freeze were improper and should be disregarded for the purpose of defining the reservation's current boundaries. The Tribe's arguments suffer from an insufficient factual record, however. As the district court noted with respect to the Tribe's 1934 freeze claim, "no proper foundation was established for the admission of . . . evidence" indicating that any land would have been affected by such a freeze. *Gaffey I*, 529 F.Supp.2d at 1051. We conclude that the Tribe's claim that the reservation boundaries were frozen in 1934 is not ripe for resolution on the record before the court.

V.

In the absence of any clear congressional intent to divest allotted lands on the Yankton Sioux Reservation of their reservation status, those lands retained such status, and all outstanding allotments continue to be reservation under § 1151(a). Furthermore, lands originally part of the Tribe's 1858 reservation regained their status as reservation land under § 1151(a) when acquired in trust under the Indian Reorganization Act. The miscellaneous trust lands, by contrast, qualify as part of a dependent Indian community and are therefore Indian country under § 1151(b). Finally, the record regarding fee lands continuously held by tribal members is not ripe for review.

With respect to the judgment of the district court, we therefore:

(1) affirm insofar as it concluded that the agency trust lands, the outstanding allotments, and the IRA trust lands are part of the Yankton Sioux Reservation and are Indian country under § 1151(a),

(2) affirm its alternative holding that the miscellaneous trust lands constitute a dependent Indian community and are Indian country under § 1151(b),

(3) vacate the district court's holding that fee lands continuously held in Indian ownership are reservation under § 1151(a), and

(4) affirm its denial of all other claims for relief.

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529 F.Supp.2d 1040

United States District Court,
D. South Dakota,
Southern Division.

YANKTON SIOUX TRIBE, and its individual members, Plaintiffs,
United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe, Plaintiff-Intervenor,
v.
Scott PODHRADSKY, States Attorney of Charles Mix County, et al., Defendants.

No. CIV 98-4042.

Dec. 19, 2007.

James G. Abourezk, Sioux Falls, SD, for Plaintiffs.

Mark E. Salter, Jan L. Holmgren, Diana J. Ryan, Assistant U.S. Attorneys, Sioux Falls, SD, for United States.

John P. Guhin, Meghan N. Dilges, Pierre, Scott J. Podhradsky, Lake Andes, Tommy Drake Tobin, Winner, SD, for Defendants.

MEMORANDUM OPINION AND ORDER

LAWRENCE L. PIERSOL, District Judge.

This case is on remand from the Eighth Circuit Court of Appeals.[1] A trial to the Court was held on

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[1] When this case was remanded by the Eighth Circuit, it was a consolidated action with *Yankton Sioux Tribe v. Southern*

(Continued on following page)

November 13 and 14, 2007. For the reasons set forth below, the Court finds the following categories of land within the original 1858 treaty boundaries of the Yankton Sioux Reservation remain part of the reservation and are Indian country under 18 U.S.C. § 1151(a): (a) land reserved to the federal government in the Act of Aug. 15, 1894, Ch. 290, 28 Stat. 286, 314-19, and then returned to the Yankton Sioux Tribe; (b) land allotted to individual Indians that remains held in trust; (c) land taken into trust under the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-77); and (d) Indian owned fee land that has continuously been held in Indian hands.

Missouri Waste Mgmt Dist, CIV 94-4217 (D.S.D.), and both cases were remanded. Although the Court has not dismissed Southern Missouri Waste Management District ("Southern Missouri") as a party to this litigation, it appears from the record that Southern Missouri is no longer taking an active role in this litigation. Southern Missouri filed a Statement On Issues Remaining After Remand, Doc. 197, on June 28, 2004, and counsel for Southern Missouri, Kenneth Cotton, appeared at a hearing held by the Court in this case on October 14, 2004, *see* Doc. 222. Thereafter, Southern Missouri has made no appearances by counsel and has filed nothing additional with the Court. Mr. Cotton continues to receive notice of entry of the Court's Orders in this case from the Clerk of Court and he is still listed as counsel of record for Southern Missouri on the Court's docket. During the Court trial in this action in November 2007, the Court observed Southern Missouri's counsel, Kenneth Cotton, in the audience and he made no attempt to make an appearance for Southern Missouri or object to the trial being conducted without Southern Missouri's participation. Southern Missouri is bound by this decision.

I. BACKGROUND

It must be decided on remand what remains of the Yankton Sioux Reservation following the Supreme Court's decision in *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 358, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) ("*Yankton Sioux Tribe*"), holding that the reservation had been diminished, and the Eighth Circuit's decision in *Yankton Sioux Tribe v. Gaffey,* 188 F.3d 1010, 1030 (8th Cir.1999) ("*Gaffey II*"). The Supreme Court held that the Yankton Sioux Reservation was diminished by the land ceded to the United States by the Yankton Sioux Tribe at the end of the nineteenth century. *See Yankton Sioux Tribe,* 522 U.S. at 358, 118 S.Ct. 789. The issue of whether the Yankton Sioux Reservation was disestablished, however, was not addressed by the Supreme Court, and the case was remanded for further proceedings. *Id.* On remand, this Court held that the Yankton Sioux Reservation was not disestablished, that all nonceded lands continued to be part of the reservation, and that all nonceded lands were subject to federal criminal jurisdiction. *See Yankton Sioux Tribe v. Gaffey,* 14 F.Supp.2d 1135 (D.S.D.1998) ("*Gaffey*"). On appeal, the Eighth Circuit affirmed this Court's decision that the Yankton Sioux Reservation was not disestablished, but found that the reservation was "further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." *Gaffey II,* 188 F.3d at 1030. Those lands are no longer "part of the Yankton Sioux Reservation and are no longer Indian country within the meaning of

18 U.S.C. § 1151." *Id.* In *Gaffey II,* the Eighth Circuit made clear that it was faced with considering "the undetermined current status of the 262,000 acres originally allotted to tribal members, some of which remain in trust, but the bulk of which have lost their trust status and are owned in fee by non Indians." 188 F.3d at 1017. Further, the Eighth Circuit explained that, "[t]he question here is one of jurisdiction, that is to what extent the Tribe retains jurisdiction over any nonceded land within the original reservation boundaries." *Id.* It should be reconfirmed that this case involves jurisdiction issues and does not affect title to real estate.

Regarding the boundary issue, the Eighth Circuit held that, "the original exterior treaty boundaries of the reservation have not been maintained." *Gaffey II,* 188 F.3d at 1030. The Eighth Circuit found that, "[t]he text of the 1894 Act and evidence regarding the parties' contemporaneous understanding of it establish that the reservation was maintained, but do not define its precise boundaries. When viewed in its full historical context, however, it is clear that the parties did not intend for the tribe to retain control over allotted lands which passed out of trust status and into non Indian hands." *Gaffey II,* 188 F.3d at 1030.

Addressing land now owned in fee by individual Indians, the Eighth Circuit assumed that such land "is not under tribal jurisdiction unless it is found to be 'within the limits of [the] Indian reservation.'" *Id.* (quoting 18 U.S.C. § 1151(a)). Based upon the record before the Eighth Circuit, however, it was unable to

define the precise boundaries of what remains of the Yankton Sioux Reservation. *Id.* Accordingly, on remand the Court is required to develop a further record and determine what the boundaries are of the Yankton Sioux Reservation. Contrary to the position of the Tribe, no one line can circumscribe what remains of the Yankton Sioux Reservation. Also, contrary to the position of the Defendants, the Yankton Sioux Reservation does exist.

Prior to the trial, the Court in 2006 set forth in a Memorandum Opinion and Order the issues that would be considered on remand. (Memorandum Opinion and Order, Doc. 223.) In that decision, the Court determined the following issues are to be decided in this remand proceeding: (1) Whether the boundaries of the Yankton Sioux Reservation were frozen by the enactment of 25 U.S.C. § 398d, which the Tribe refers to as "the 1927 Act"; (2) If the boundaries of the Yankton Sioux Reservation were not frozen by the 1927 Act, were the boundaries frozen by the Indian Reorganization Act, Ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-77), referred to as "the 1934 Act", such that all lands alienated to non-Indians after 1934 and prior to the 1948 Supervised Sales Act, 25 U.S.C. § 483, are within the boundaries of the Yankton Sioux Reservation; (3) What lands are currently trust lands; (4) Are the trust lands "Indian country" under 18 U.S.C.

§ 1151(a)[2] or § 1151(c)[3]; and (5) What is the reservation status of nonceded fee lands *to the extent that* such status has not been decided by the appellate courts.

Defendants' primary arguments are that the Court should find the Yankton Sioux Reservation has been disestablished, that there are no remaining boundaries of the reservation and that no lands within the former reservation constitute "reservation" under 18 U.S.C. § 1151(a). They contend none of the individual categories of land identified by the courts or the parties constitute "reservation" under 18 U.S.C. § 1151(a). Contrary to the United States' position, Defendants contend each individual parcel of land taken into trust does not become a discrete "reservation" under 18 U.S.C. § 1151(a), with its own boundaries, and each piece of allotted land does not have such "reservation boundaries." Defendants

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[2] 18 U.S.C. § 1151(a) provides as follows

> Except as otherwise provided in section 1154 and 1156 of [Title 18], the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation . . .

[3] 18 U.S.C. § 1151(c) provides as follows

> Except as otherwise provided in section 1154 and 1156 of [Title 18], the term "Indian country", as used in this chapter, means . . . (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same

argue the Tribe's position that the northern 1858 boundary is gone but that the southern 1858 boundary remains is untenable. Set forth immediately below are more specific arguments advanced by Defendants in support of their general arguments described above.

Defendants argue there are no "reservation" boundaries as that term is defined under 18 U.S.C. § 1151(a), because the reservation has been disestablished and Congress has not created new boundaries. Congress' failure to create new boundaries results in the Yankton Sioux Reservation having no boundaries and the Courts lack the power to themselves create such boundaries, according to Defendants. Next, Defendants argue the South Dakota Supreme Court's determination in *Bruguier v. Class*, 599 N.W.2d 364 (S.D.1999), that the Yankton Sioux Reservation has been disestablished, is correct. In a similar vein, Defendants argue the Eighth Circuit's determination that the Yankton Sioux Reservation has not been disestablished is inconsistent with the Supreme Court's decision in *DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975). The law of this case is that the Yankton Sioux Reservation has been diminished and not disestablished. *DeCoteau* is distinguishable and does not control nor affect this controversy. The Tribe and the Defendants were advised prior to the Court trial that their respective positions that there was no diminishment and that there was disestablishment would not be revisited in this trial. (Order, Doc. 399, Nov. 8, 2007.)

Addressing claims raised by the Tribe following the remand, the Defendants argue 25 U.S.C. § 398d, or the "1927 Act", did not freeze the boundaries of the Yankton Sioux Reservation as of 1927. First, Defendants contend the Tribe waived this argument by not raising it earlier in this litigation and is barred by the issuance of the mandate by the Eighth Circuit and the law of the case doctrine. Second, Defendants contend the 1927 Act does not apply to the Yankton Sioux Reservation because that Act applies only to executive order reservations, not to reservations created by treaty, as was the Yankton Sioux Reservation. Finally, Defendants maintain that even if the Court determines the 1927 Act could apply to treaty reservations, the Act did not "freeze" the boundaries of the Yankton Sioux Reservation because the intent of the 1927 Act was to impose limits on the authority of the President to enlarge or contract reservation boundaries. The 1927 Act was not intended to limit the ability of Congress to continue the policy of former acts it passed, such as the 1894 Act by which Congress intended to increase jurisdiction of the State of South Dakota on the Yankton Sioux Reservation as white settlers came on to the opened lands. Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, 314-19 ("1894 Act"); *see Gaffey II*, 188 F.3d at 1028 (explaining that the 1894 Act "intended to diminish the reservation by not only the ceded lands, but also by the land which it foresaw would pass into the hands of the white settlers and homesteaders.").

Another claim of frozen boundaries advanced by the Tribe is under 25 U.S.C. §§ 462 and 464, which was referred to above as "the 1934 Act". Defendants counter the Tribe's arguments by claiming the Tribe has waived this argument and it is prohibited by the Eighth Circuit's mandate in this case, as well as by the law of the case doctrine. The second argument advanced by Defendants is that the 1934 Act was optional for Indian tribes and, thus, the intent of Congress could not have been to "freeze" reservation boundaries. In addition, Defendants argue the legislative history and text of the 1934 Act do not support the Tribe's claim of "freezing" reservation boundaries.

Next, Defendants disagree with the United States' argument that roughly 6,000 acres of land taken into trust under the 1934 Act are "Indian country" under 18 U.S.C. § 1151(a). Defendants contend the text of the 1934 Act, the legislative history, early treatment of the lands, case authority, and an admission by the United States in another case all defeat the notion that the trust lands are "reservation" under § 1151(a). The textual argument is that the structure of the 1934 Act precludes a finding that Section 5, 25 U.S.C. § 465, "trust" lands are automatically Section 7, 25 U.S.C. § 467, "reservation" lands. Specifically, Defendants interpret Section 7 to require a "proclamation" by the Secretary of the Interior that the lands taken into trust under Section 5 are "reservation" lands. In support of this argument, Defendants cite *United States v. Stands*, 105 F.3d 1565 (8th Cir.1997). Defendants contend

Stands is directly on point and holds that placement of land into trust for an Indian tribe does not make such land "reservation" or "Indian country."

An additional argument raised by the Defendants is that certain lands claimed as trust land have never been formally accepted into trust status, and, therefore, such lands are neither trust land nor reservation. Specifically, the Defendants argued in their pre-trial brief that 3,201 acres of land, constituting thirty parcels, are not trust land because the United States cannot produce any written acceptance of these lands into trust status. At trial, however, the Court ruled the Defendants are barred from challenging the trust status of these lands because the United States has not waived its sovereign immunity under the Quiet Title Act, 28 U.S.C. § 2409a(a), as to lands held in trust for Indians, and therefore, the Court lacks jurisdiction to even consider the merits of Defendants' challenge to the United States title to the lands at issue. *See Governor of Kansas v. Kempthorne*, 505 F.3d 1089 (10th Cir.2007) (the courts lack jurisdiction to address the merits of a quiet title action against the United States involving trust lands because the United States has not waived its sovereign immunity under the Quiet Title Act as to land held in trust for Indian tribes).

As to the allotted lands, the Defendants argue the remaining allotted lands within the 1858 boundaries are not "reservation" or "Indian country" under 18 U.S.C. § 1151(a). Rather, Defendants argue the allotted lands are "Indian country" under 18 U.S.C.

§ 1151(c), to the extent that such allotted lands have not left Indian hands. In support of this argument, Defendants point to the Eighth Circuit's holding that the Yankton Sioux Reservation "has been further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands. These lands are not part of the Yankton Sioux Reservation and are no longer Indian country within the meaning of 18 U.S.C. § 1151." *Gaffey II*, 188 F.3d at 1030. Defendants conclude the allotted lands cannot be "reservation" under § 1151(a), because the Supreme Court ruled in *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), that allotted land leaving allotted status remains "Indian country" *only* if it is on a "reservation." The short answer is that such lands are on a reservation because those lands form a part of the boundaries of this checkerboard reservation.

The Yankton Sioux Tribe's position is that the Court should draw a boundary in the northern part of Charles Mix County that excludes the ceded lands referred to by the Supreme Court and leave untouched the east, west and south boundaries of the 1858 Yankton Sioux Reservation. Exhibit 9, received as an illustrative exhibit at the trial, depicts the Tribe's "suggested boundary" of the Yankton Sioux Reservation. This Exhibit shows a reservation with one continuous boundary. A checkerboard reservation should be avoided, argues the Tribe, because drawing a boundary around each parcel of trust land, or each

Indian owned parcel, would result in a less desirable checkerboard reservation. The Tribe also points out that the Defendants' position, that the Yankton Sioux Reservation was disestablished, has been consistently rejected by the Supreme Court, the Eighth Circuit and this Court.

The United States likewise argues the Defendants' arguments regarding disestablishment are foreclosed by the Eighth Circuit's holding that the Yankton Sioux Reservation has not been disestablished. *See Gaffey*, 188 F.3d at 1030 ("[W]e hold that the Yankton Sioux Reservation has not been disestablished. . . ."). In addition, the United States contends the Defendants' challenge to certain deeds placing land in trust for the Yankton Sioux Tribe thirty to seventy years ago, is precluded because the United States has not waived its sovereign immunity under the Quiet Title Act, 28 U.S.C. § 2409a, and by the six-year statute of limitations for actions brought under the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* As set forth above, the Court agreed with the United States' argument and held during the trial that the Defendants are barred from challenging the United States' title to the lands it holds in trust for the Yankton Sioux Tribe and its members. *See Governor of Kansas*, 505 F.3d at 1089.

The United States' position on what remains of the diminished Yankton Sioux Reservation is: the land originally set aside for the Yankton Sioux by treaty in 1858 that are Indian trust allotments that remain in Indian ownership; those lands returned to

the Tribe by Act of February 13, 1929, 45 Stat. 1167; and, those lands taken into trust for the Tribe under the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.* These lands, according to the United States, are Indian country under 18 U.S.C. § 1151(a), as they are "within the limits of any Indian reservation under the jurisdiction of the United States Government. . . ." As to the Indian owned fee land, the United States does not take a position on whether such land is included in the Yankton Sioux Reservation, leaving that issue for the Tribe to pursue. The United States also does not take a position on the 1927 Act and 1934 Act claims advanced by the Tribe.

As to the lands taken into trust for the Tribe under the 1934 Act, the United States argues that although the 1858 original exterior boundaries no longer serve to separate Indian country from areas under State jurisdiction, when the property is reacquired in trust within those boundaries, it becomes reservation and Indian country pursuant to 18 U.S.C. § 1151(a).

Addressing one of the Defendants' arguments, the United States contends its conclusion that tribal trust land is reservation is not inconsistent with the Secretary of the Interior's separate authority under 25 U.S.C. § 467 to add lands to existing reservations. Contrary to the Defendants' claim, the United States contends the plain reading of § 467 is that there is no requirement for proclamation in order to add lands to an existing Indian reservation. The United States correctly distinguishes the case cited by the

Defendants, *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460 (D.C.Cir.2007) ("*Citizens*"), from the present case because *Citizens* involved the creation of a new reservation that would require a proclamation under 25 U.S.C. § 467. Further, *Citizens* involved the creation of a new reservation that would qualify for gaming as an "initial reservation" under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, which is not involved in the present case.

A second case the United States distinguishes is *South Dakota v. United States Dept. of Interior*, 487 F.3d 548 (8th Cir.2007). In *South Dakota*, the Flandreau Santee Sioux Tribe sought to place land in trust that was never within its reservation boundaries and the Eighth Circuit left unanswered the question of whether "all land taken into trust *off reservation* . . . constitutes Indian country." *Id.* at 553 (emphasis added). Accordingly, the *South Dakota* case did not involve the present question of whether land taken into trust within the original exterior boundaries of an Indian reservation that has not been disestablished is Indian country under 18 U.S.C. § 1151(a).

In addition to the above positions, the United States contends the lands acquired in trust under the 1934 Act can constitute an informal or de facto reservation under 18 U.S.C. § 1151(a).

Another category of lands at issue is the reserve lands, which were lands reserved for the Tribe for agency, schools, and other purposes and reserved from sale to settlers. The United States' position

regarding the reserve lands is that the *Gaffey* court found that these lands "were expected to remain outside of primary state jurisdiction," which, conversely, means they were intended to remain within federal jurisdiction. *Gaffey*, 188 F.3d at 1027. The 1929 Act, 45 Stat. 1167, resolved any doubt about the reserve lands, urges the United States, wherein Congress unambiguously demonstrated its intent that the reserve lands be transferred to the Tribe when they are no longer needed for the original purposes for which they were reserved.

The Court allowed the filing of an amici curiae brief by Charles Mix County landowners, Doc. 335, wherein the landowners urge the Court to reject the Tribe's arguments regarding the 1927 and 1934 Acts and to conclude the only lands to be reservation or Indian Country are those lands which are currently held in trust by the United States for the benefit of an Indian person.

II. DISCUSSION

The Supreme Court has made clear that "only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem v. Bartlett*, 465 U.S. 463, 470, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984).

The inescapable result of the prior court decisions interpreting Congressional acts affecting the Yankton Sioux Reservation is that it is a checkerboard reservation. The Eighth Circuit clearly envisioned a checkerboard reservation pursuant to its dual holdings that the 1858 reservation boundaries are no longer in effect and that, "the land reserved to the federal government in the 1894 Act and then returned to the Tribe continues to be a reservation under § 1151(a). . . ." *Gaffey II,* 188 F.3d at 1030. The land reserved to the federal government and returned to the Tribe was identified as one category of trust land on the Yankton Sioux Reservation and it consists of scattered lands throughout the original 1858 reservation. The Eighth Circuit made clear that these scattered lands continue to be Indian country under 18 U.S.C. § 1151(a). As with the reserve lands, the two additional categories of trust lands identified by the Eighth Circuit consist of scattered lands within the original 1858 boundaries. *See id.* Although the Eighth Circuit was able to identify the categories of trust land existing on the Yankton Sioux Reservation, the record had not been developed as to which tracts of land fall within those categories. Accordingly, on remand the parties were directed to develop the record as to which tracts of land on the Yankton Sioux Reservation are in the three categories of trust land identified by the Eighth Circuit. The trial record does now contain that information.

The Court will first address the Tribe's claims that the 1927 and 1934 Acts froze the boundaries of

the Yankton Sioux Reservation. Next, the Court will discuss whether trust lands are reservation land and whether the land qualifies as Indian country under 18 U.S.C. § 1151(a) or (c). United States' claim that the Yankton Sioux Reservation is a de facto or informal reservation will then be discussed. The final categories of land that will be addressed is Indian-owned fee land continuously held in Indian hands. Finally, the Court will discuss dependent Indian communities.

A. 1927 Act Claim

The Tribe contends Congress froze the reservation boundaries when it enacted 25 U.S.C. § 398d, referred to above as "the 1927 Act", such that all lands sold to non-Indians after 1927 and before the Supervised Sales Act of 1948, 62 Stat. 236, codified at 25 U.S.C. § 483, are within the reservation boundaries. The 1927 Act provides as follows; "§ **398d. Changes in boundaries of Executive order reservations.** Changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress." 25 U.S.C. § 398d.

Defendants' first argument is that the Tribe waived this claim by failing to raise it earlier in the litigation. In a Memorandum Opinion and Order, Doc. 223, the Court held the issue of the 1927 Act would be decided in these remand proceedings. The specific

reasons for rejecting Defendants' waiver arguments as to both the 1927 Act claim and the 1934 Act claim were explained by the Court in its Response to Defendants' Petitions for Writ of Mandamus, filed with the Eighth Circuit in April 2007:

> Regarding the 1934 Act argument advanced by the Tribe on remand and referred to in the Court's Memorandum Opinion and Order dated December 13, 2006, the Eighth Circuit clearly contemplated argument and development of the record on remand of "land taken into trust under the Indian Reorganization Act of 1934." *Gaffey II*, 188 F.3d at 1030. Thus, the Eighth Circuit clearly contemplated the Court would consider arguments concerning the 1934 Act on remand. The Eighth Circuit recognized there will be additional issues on remand that were not decided in prior proceedings due to the limited development of the record on issues other than disestablishment or maintenance of the 1858 boundaries. *Id.* at 1030-31. The Court finds the Tribe's arguments regarding the 1927 Act, at least at this point in the proceedings, are similar in nature to the arguments regarding the 1934 Act. If the Eighth Circuit believed that all arguments not previously raised by the Tribe were waived, there would have been no reason to remand this case to this Court for development of the record and further proceedings consistent with its opinion. The Eighth Circuit recognized the parties "followed an all or nothing strategy (the State arguing disestablishment and the

> Tribe claiming maintenance of the 1858 boundaries)," *Gaffey II*, 188 F.3d at 1030, which resulted in an incomplete record. Moreover, it would have been a waste of judicial resources for the parties and the Court to make the necessary findings and conclusions regarding the 1927 Act and the 1934 Act without a final ruling regarding disestablishment or maintenance of the 1858 boundaries.

Petition for Writ of Mandamus, Nos. 07-1723, 07-1779, *In re: Michael Rounds, et al.*, (8th Cir. Mar. 22, 2007) (District Court's Response to Defendants' Petitions for Writ of Mandamus). Defendants' waiver, law of the case and mandate rule arguments are rejected for the reasons quoted above.

Citing *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 325, 62 S.Ct. 1095, 86 L.Ed. 1501 (1942) and the 1927 Act's legislative history[4], the Defendants

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[4] The Defendants argue if the 1927 Act were to apply to *all* reservations, including treaty reservations, the language in the statute specifying its application to executive order reservations would have been unnecessary In support of this argument, the Defendants quote comments from a House debate distinguishing between treaty and executive order reservations

> Now let us go just a little into the history of the difference between a treaty reservation and an Executive-order reservation. A treaty reservation is one by which the Indians are placed on certain areas of land under an agreement with the Indians-land usually formerly occupied and owned by these same Indians under right of occupancy An Executive-order reservation is that which is set aside for the tribe by Executive

(Continued on following page)

contend the 1927 Act applies only to reservations created by Executive order or proclamation and not to reservations created by treaty. There is no dispute that the Yankton Sioux Reservation was created by treaty, rather than by Executive order or proclamation. The Tribe cites no case law or legislative history in support of its claim that the reservation boundaries were frozen as of 1927. Rather, the Tribe argues the "language of that statute is eminently clear." (Plaintiff's Supplemental Brief, Doc. 367 at p. 2.).

The Court finds the language of 25 U.S.C. § 398d unambiguously applies to reservations created by action of the Executive, whether it be by order, proclamation or otherwise, and does not apply to reservations created by treaty, such as the Yankton Sioux Reservation. *See Sioux Tribe*, 316 U.S. at 325 n. 6, 62 S.Ct. 1095 (distinguishing between executive order reservations and treaty reservations and noting that with the 1927 Act, Congress provided that, "any future changes in the boundaries of executive order reservations should be made by Congress alone."). Accordingly, the boundaries of the Yankton Sioux Reservation were not frozen by the 1927 enactment of 25 U.S.C. § 398d.

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proclamation and this character of reservation is also usually composed of a portion of lands formerly occupied by such Indians

68 Cong. Rec. 4571(1927).

B. 1934 Act Claim

The second frozen boundaries claim advanced by the Tribe is that the Indian Reorganization Act, referred to above as "the 1934 Act", froze the boundaries of the Yankton Sioux Reservation upon its enactment. Section 2 of the 1934 Act provides that, "[t]he existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress." 25 U.S.C. § 462. In addition, the sale of allotments was restricted in 1934 under 25 U.S.C. § 464, which stated that, "[e]xcept as provided in this Act, no sale, devise, gift, exchange, or other transfer of restricted Indian lands. . . . shall be made or approved. . . ."

Defendants' arguments of waiver, law of the case and violation of the mandate as to the 1934 Act claim are rejected for the same reasons explained above for rejecting these arguments as to the 1927 Act claim.

It was clearly Congress' intent in enacting the 1934 Act to halt the loss of land on the nation's Indian reservations as a result of the allotment policy. *See Chase v. McMasters*, 573 F.2d 1011, 1016 (8th Cir.1978) (explaining that the Indian Reorganization Act of 1934 "reflected a new federal policy of halting the loss of Indian lands which had occurred under statutes that allotted tribal lands to individual Indians and disposed of 'surplus' land under settlement laws."). It naturally follows that one result of the

1934 Act was to "freeze" the boundaries of the Yankton Sioux Reservation.

Legislative history is quoted by the Defendants, but legislative history is not persuasive if the statute itself is clear on its face. *See United States v. Maswai*, 419 F.3d 822, 824 (8th Cir.2005) (explaining that a court's "task in interpreting legislation is to start with the plain meaning of its words, and 'only if the statute is ambiguous do we look to the legislative history to determine Congress's intent.'"). Sections 462 and 464 are clear. There was to be "no sale, devise, gift, exchange, or other transfer of restricted Indian lands. . . ." 25 U.S.C. § 464. Self-serving opinions by various government officials that they could still transfer Indian lands, despite the 1934 Act, are contrary to law and provide no authority for such transfers.

The "freezing" of the boundaries of the Yankton Sioux Reservation ended in 1948 when Congress enacted the Supervised Sales Act, 25 U.S.C. § 483[5],

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[5] Section 483 provides as follows

> The Secretary of the Interior, or his duly authorized representative, is authorized in his discretion and upon application of the Indian owners, to issue patents in fee, to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians under the provision of the Act of June 18, 1934 (48 Stat. 984) [25 U.S.C. § 461 et seq.], or the Act of June 26, 1936 (49 Stat. 1967) [25 U.S.C. § 501 et seq.]

25 U.S.C. § 483

which lifted restrictions of the 1934 Act and allowed the Secretary of the Interior to grant patents in fee to Indian owners upon application. As explained below in the discussion of the Indian country status of trust lands, the Court finds that land placed into trust for the Yankton Sioux Tribe and its members under the 1934 Act is Indian country under § 1151(a). Rather than continuing to freeze the boundaries, the Court finds the boundaries of the Yankton Sioux Reservation change when land is taken into trust under the 1934 Act. Accordingly, the Court accepts that portion of the Tribe's claim that the 1934 Act froze the boundaries of the Yankton Sioux Reservation at the time of its enactment, but rejects the Tribe's claim that the freeze continued through the present time. The "freeze" ended in 1948, thereby nullifying the present and ultimate effect of a "freeze" from 1934 to 1948. *See Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. Hallett*, 708 F.2d 326, 330-31 (8th Cir.1983) ("Assuming that Section 4 of the Indian Reorganization Act did limit the Secretary's authority to issue fee patents to individual allottees, Congress lifted that limitation in 1948, as to trust lands 'held. . . . under' the Indian Reorganization Act of 1934, by passing 25 U.S.C. § 483 (1976).") (footnote omitted).

Likewise, the Supervised Sales Act of 1948 cured those real estate transfers. The "freeze" was as to land transfers and not as to any one boundary, because even in 1934 to 1948 there was no one, single reservation boundary. The various boundaries that

were frozen during that time period were various tracts of Indian land held by the United States. At trial, the Tribe claimed there were tracts of land affected by this 1934 freezing claim, but no proper foundation was established for the admission of such evidence so this 1934 freezing analysis might be a moot issue. In addition, there is nothing in the record to indicate that any land was subject to the Sioux exception as stated in 25 U.S.C. § 474 (Section 14 of the 1934 Act). Even if it is not a moot issue, any resulting title defects were cured by the Supervised Sales Act of 1948.

Finally, it is not clear whether or not the Tribe properly excluded itself from the operation of the 1934 Act. It takes affirmative steps for such exclusion and the record does not show full compliance with the requirements for exclusion from the 1934 Act, so no exclusion is found even though it was apparently attempted. *See* 25 U.S.C. § 478.

C. Status of Trust Lands on Yankton Sioux Reservation

The Eighth Circuit remanded this case for the Court to make "any necessary findings relative to the status of Indian lands which are held in trust," because "[t]he current amount of Indian trust land on the Yankton Sioux Reservation [was] unclear from the record [before the Eighth Circuit]." *Gaffey II*, 188 F.3d at 1030. During the Court trial in this action, the parties identified the tracts of land on the Yankton

Sioux Reservation that are within the three categories of trust land identified by the Eighth Circuit: "1) the land reserved to the federal government in the 1894 Act and later returned to the Yankton Tribe, 2) land allotted to individual Indians that remains held in trust, and 3) land taken into trust under the Indian Reorganization Act of 1934." *Id.*

Four spreadsheets, admitted at trial as Exhibits 202, 203, 204 and 211, list the current tracts of trust land on the Yankton Sioux Reservation. In addition to the spreadsheets, there are sub-exhibits, which provide documentation relating to each of the tracts of land listed on the spreadsheets. During the trial, the parties agreed that some of the tracts were listed in the wrong category on the spreadsheets. Accordingly, after the trial the United States submitted a Motion clarifying the stipulations entered into at trial by the parties regarding certain tracts of land and attached revised spreadsheet Exhibits and explaining which tracts were to be moved to different categories. The Court entered an Order granting this unopposed motion. (Doc. 423.) In the revised spreadsheet exhibits submitted after the Court trial, Exhibit 202 lists the tracts of trust land on the Yankton Sioux Reservation that were taken into trust by the United States after the 1934 Act, totaling 6,444.47 acres. Revised Exhibit 203 lists the tracts of trust land on the Yankton Sioux Reservation that were pre-1934 fee to trust or non-reserve Secretarial order trust lands, totaling 174.57 acres. Exhibit 204 lists the tracts of land on the Yankton Sioux Reservation that were

allotted trust lands and are now tribal trust lands, totaling 4,496.58 acres. Exhibit 211 lists the tracts of land on the Yankton Sioux Reservation that are allotted trust lands, totaling 25,555.08 acres.

The Eighth Circuit recognized in *Gaffey II* that before the modern definition of Indian country, set forth in 18 U.S.C. § 1151, was established in 1948, "Indian lands were defined to include 'only those lands in which the Indians held some form of property interest: trust lands; individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians.'" *Gaffey II*, 188 F.3d at 1022. Thus, determining Congressional intent before 1948 as to "reservation" status under § 1151(a) "is complicated by the fact that modern distinctions between different categories of Indian country were not recognized by . . . legislators who had a different understanding of the requirements for land to be classified as reservation land and/or Indian country." *Id.* at 1021. "The notion of a reservation as a piece of land, all of which is Indian country regardless of who owns it, would have thus been quite foreign." *Id.* at 1022.

1. Reserve lands

Defendants' argument that none of the categories of land defined by the Courts or the parties constitute "reservation" under 18 U.S.C. § 1151(a), is a veiled attempt to discredit the result of the Eighth Circuit's decision in *Gaffey II*, which is that the Yankton Sioux

Reservation is now a checkerboard reservation. The Eighth Circuit clearly envisioned the Yankton Sioux Reservation is a checkerboard reservation pursuant to its dual holdings that the 1858 reservation boundaries are no longer in effect and that, "the land reserved to the federal government in the 1894 Act and then returned to the Tribe continues to be a reservation under § 1151(a). . . ." *Gaffey II*, 188 F.3d at 1030. The first category of trust land, i.e., land reserved to the federal government in the 1894 Act and later returned to the Tribe, consists of scattered lands throughout the original 1858 reservation. The Eighth Circuit made clear that these scattered reserve lands continue to be Indian country under § 1151(a), which can only mean that there is a checkerboard reservation. The other two categories of trust land described by the Eighth Circuit likewise consist of scattered land within the 1858 boundaries of the Yankton Sioux Reservation.

2. Land allotted to individual Indians that remains held in trust

The Eighth Circuit declared that although the Yankton Sioux Reservation has not been disestablished, "it has been further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." *Gaffey II*, 188 F.3d at 1030. Accordingly, if originally allotted land passed out of Indian hands at any time after it was allotted, it is not part of the Yankton Sioux Reservation. Trial Exhibit 211 identifies the tracts of

land on the Yankton Sioux Reservation that are allotted trust lands. As to this category of lands, the Defendants contend the law of the case pursuant to *Gaffey II*, is that allotted land can only be Indian country under 18 U.S.C. § 1151(c) and cannot be Indian country under § 1151(a).

Contrary to the Defendants' arguments, the United States contends allotted land that remains held in trust is reservation, and thus Indian country under § 1151(a), as a result of the Eighth Circuit's findings that the Yankton Sioux Reservation was not disestablished and that the text of the 1894 Act establishes the Congressional intent to "reserve land to be used to care for continued tribal interests," *Gaffey II*, 188 F.3d at 1028, in combination with the overarching principle that "[a]fter land is set aside for an Indian reservation, it retains that status until Congress explicitly indicates otherwise," *Solem*, 465 U.S. at 469, 104 S.Ct. 1161. Due to the sparsity of the factual record, the Eighth Circuit was unable to identify on the record before it which allotted land remained held in trust by the United States. *See Gaffey II*, 188 F.3d at 1028, 1030. That information was presented to the Court on remand in Trial Exhibit 211.

The Court agrees with the United States' position and further notes that there has been no finding by the appellate courts that the Yankton Sioux Reservation has been diminished by allotted land that remains held in trust. The Court finds no evidence of Congressional intent to so diminish the Yankton

Sioux Reservation. Accordingly, the land allotted to individual Indians that remains held in trust is reservation and is Indian country under 18 U.S.C. § 1151(a).

3. Lands taken into trust under the 1934 Act

As to the lands taken into trust under the 1934 Act, the United States claims that although the 1858 original exterior boundaries no longer serve to separate Indian country from areas under State jurisdiction, when the property is reacquired in trust within those boundaries, it becomes reservation and Indian country pursuant to 18 U.S.C. § 1151(a). Defendants, however, contend a parcel of land taken into trust under 25 U.S.C. § 465, part of the 1934 Act, cannot be reservation land unless there is a proclamation under 25 U.S.C. § 467 that it is a new reservation or is added to an existing reservation. Section 467 provides that:

> The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided,* That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

25 U.S.C. § 467.

Defendants' interpretation of 25 U.S.C. § 467 is strained. Contrary to Defendants' argument, the United States contends its conclusion that tribal trust land is reservation is not inconsistent with the Secretary of the Interior's separate authority under 25 U.S.C. § 467 to add lands to existing reservations. The United States argues the plain reading of § 467 is that there is no requirement for proclamation in order to add lands to an existing Indian reservation. The United States argues the case cited by the Defendants, *Citizens,* 492 F.3d at 460, is distinguishable from the present case because *Citizens* involved the creation of a *new* reservation that would require a proclamation under 25 U.S.C. § 467. Further, *Citizens* involved the creation of a new reservation that would qualify for gaming as an "initial reservation" under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, which is not involved in the present case. The Court agrees that *Citizens* is inapplicable to the case before the Court for the reasons advanced by the United States.

A second case the United States seeks to distinguish is *South Dakota,* 487 F.3d at 548, which was cited by the Defendants. In *South Dakota,* the Flandreau Santee Sioux Tribe sought to place land in trust that was never within its reservation boundaries and the Eighth Circuit left unanswered the question of whether "all land taken into trust *off reservation* . . . constitutes Indian country." *Id.* at 553 (emphasis added). Accordingly, the Court agrees with the United States that the *South Dakota* case did not

involve the question of whether land taken into trust within the original exterior boundaries of an Indian reservation that has not been disestablished is Indian country under 18 U.S.C. § 1151(a).

The Court interprets 25 U.S.C. § 467 to require a proclamation by the Secretary only in situations where new Indian reservations are being created. As observed by the United States, "[i]t is redundant to proclaim the land a reservation when it is acquired in trust for the Tribe within a reservation that is not disestablished." (Doc. 346 at p. 8.) The acquisition of land not previously within the boundaries of an Indian reservation presents a different situation than acquiring land in trust within the original boundaries of a diminished reservation. The land acquisition regulations under the 1934 Act treat acquisitions on a diminished reservation as an on-reservation acquisition. *See* 25 C.F.R. § 151(f). The Court rejects Defendants' argument and holds that the absence of a proclamation under 25 U.S.C. § 467 for land taken into trust under the 1934 Act, 25 U.S.C § 465, which is within the original boundaries of a diminished reservation, does not prevent the land from being reservation land. Given the Eighth Circuit's holding that the Yankton Sioux Reservation was not disestablished, in combination with its holding that the reserve lands continue to be reservation under § 1151(a), and the Court's finding that a proclamation under 25 U.S.C. § 467 was not required in this case, the Court concludes all land within the original 1858 treaty boundaries of the Yankton Sioux Reservation

held by the United States in trust pursuant to the 1934 Act constitutes reservation and Indian country under 18 U.S.C. § 1151(a).

D. Informal or De facto Reservation

An alternate position advanced by the United States is that all of the land held by the United States in trust for the Tribe and its individual members is a "reservation" for purposes of federal criminal jurisdiction under 18 U.S.C. § 1151(a), even if it is found to not be a formally designated reservation. *See Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 511, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). In *Oklahoma Tax Comm'n,* the Supreme Court explained it has "stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.' Rather, we ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government.'" 498 U.S. at 511, 111 S.Ct. 905 (quoting *United States v. John,* 437 U.S. 634, 648-49, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978)). In *United States v. John,* 437 U.S. 634, 648-49, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978), the Supreme Court held the federal government had authority to prosecute an Indian, under 18 U.S.C. §§ 1153 and 1151(a), for a crime committed on land held in trust by the United States for the benefit of the Mississippi Choctaw Indians, who were under federal supervision. In that case, the land at issue was later proclaimed to be a

reservation, but the Supreme Court held that prior to the proclamation there was "no apparent reason why these lands, which had been purchased in previous years for the aid of [the Mississippi Choctaw] Indians [and held in trust by the Federal Government for their benefit], did not become a 'reservation,' at least for the purposes of federal criminal jurisdiction at that particular time." *Id.* (citing *United States v. Celestine,* 215 U.S. 278, 285, 30 S.Ct. 93, 54 L.Ed. 195 (1909)).

In a case considering whether certain land was "Indian country" under 18 U.S.C. § 1151(a), the Eighth Circuit explained, "[i]t is well established that the actions of the federal government in its treatment of Indian land can create a *de facto* reservation, even though the reservation was not created by a specific treaty, statute or executive order." *United States v. Azure,* 801 F.2d 336, 338 (8th Cir.1986). In an effort to avoid this holding in *Azure,* Defendants cite *Stands,* 105 F.3d at 1572, for the proposition that placing land into trust for an Indian tribe does not make it Indian country under 18 U.S.C. § 1151. In *Stands,* the Eighth Circuit stated, "[f]or jurisdictional purposes, tribal trust land beyond the boundaries of a reservation is ordinarily not Indian country." *Id.* at 1572. But *Stands* does not control the result in this case. *Stands* considered federal jurisdiction, under 18 U.S.C. § 1151(c), on land that was outside the clearly defined boundaries of a reservation. *See id.* Rather than considering jurisdiction under § 1151(c) over allotted land that is outside the clear boundaries of a

diminished reservation, as in *Stands*, the Court is faced in this case with determining what the boundaries are of a diminished reservation. Moreover, as recognized by Chief Judge Karen E. Schreier, the above quoted language in *Stands*, "is dicta which does not overcome the wealth of legal authority establishing that trust land qualifies as 'Indian country.'" *South Dakota v. United States Dep't of Interior*, 401 F.Supp.2d 1000, 1010 (D.S.D.2005) (citing *Oklahoma Tax Comm'n*, 498 U.S. at 511, 111 S.Ct. 905; *United States v. Roberts*, 185 F.3d 1125, 1131 (8th Cir.1999); *Buzzard v. Okla. Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir.1993), *cert. denied sub. nom. United Keetoowah Band of Cherokee Indians v. Okla. Tax Comm'n*, 510 U.S. 994, 114 S.Ct. 555, 126 L.Ed.2d 456 (1993); *Azure*, 801 F.2d at 338).

Citing *Azure*, 801 F.2d at 338-39, the *Stands* court recognized federal jurisdiction under § 1151(a) may be established if the land at issue is found to be a de facto reservation or dependent Indian community. 105 F.3d at 1572 n. 3. That situation was not addressed in *Stands*, however, because the government had not argued that *Azure* or similar cases applied to the land at issue in *Stands*. Interestingly, the holding in *Stands* was that an individual allotment off the reservation was "Indian country" for purposes of federal criminal jurisdiction. The Court finds the above-quoted language from *Stands* is dicta and is not controlling in the present case, and in any event, for the reasons set forth above, the present case is distinguishable from *Stands*. The Court further finds

the Eighth Circuit's earlier holding in *Azure*, 801 F.2d at 338, applies to the land at issue in the present case.

As to all of the trust land identified in Revised Exhibits 202, 203, 204 and 211, the federal government has validly set apart that land for use of the Yankton Sioux Indians. Donalene Orozo, the Realty Officer in the Bureau of Indian Affair's ("BIA") Yankton Agency in Wagner, testified that her office maintains all leases on trust lands on the Yankton Sioux Reservation. The BIA negotiates the leases, collects the rents and distributes the rents according to tribal status reports. Federal Bureau of Investigation Agent Matthew Miller testified that the FBI exercise criminal jurisdiction over all trust land on the Yankton Sioux Reservation, and does not distinguish between land taken into trust under the 1934 Act, reserve land, or allotted land held in trust. Agent Miller relies upon the BIA Realty Office to advise him whether any particular tract of land is held in trust by the United States. The above-referenced testimony establishes that the federal government provides supervision over all trust lands on the Yankton Sioux Reservation. Based upon the exhibits received during the trial and the testimony of Ms. Orozo and FBI Agent Matthew Miller, the Court concludes the federal government has validly set apart the tracts of land identified in Revised Exhibits 202, 203, 204 and 211 for use of the Yankton Sioux Indians. Accordingly, the trust lands identified in Revised Exhibits 202,

203, 204 and 211 constitute a reservation, at least for purposes of jurisdiction under 18 U.S.C. § 1151(a).

E. Indian-owned fee land continuously held in Indian hands

The Eighth Circuit held that the Yankton Sioux Reservation "has been further diminished by the loss of those lands originally allotted tribal members which have passed out of Indian hands." *Gaffey II*, 188 F.3d at 1030. As to Indian-owned fee lands, the Eighth Circuit assumed "that land now owned in fee by individual Indians is not under tribal jurisdiction unless it is found to be 'within the limits of [the] Indian reservation.' 18 U.S.C. § 1151(a)." *Id.* The Eighth Circuit's diminishment finding is limited to previously allotted lands *which have passed out of Indian hands*. *Id.* (emphasis added). There has been no finding by an appellate court and this Court finds no evidence on this record that Congress intended to diminish the Yankton Sioux Reservation by previously allotted land now owned in fee which has never passed out of Indian hands. The principle that "[a]fter land is set aside for an Indian reservation, it retains that status until Congress explicitly indicates otherwise," *Gaffey II*, 188 F.3d at 1021 (citing *Solem*, 465 U.S. at 470, 104 S.Ct. 1161), applies to these lands. Above, the Court found that trust lands are reservation under 18 U.S.C. § 1151(a), and the Court finds no reason to treat any differently Indian-owned fee land on the Yankton Sioux Reservation, which has been continuously held in Indian hands. Accordingly, the

Court finds that previously allotted land, which is now owned in fee and has been continuously owned by an Indian, retains its reservation status and it is Indian country under 18 U.S.C. § 1151(a).[6]

The Tribe introduced exhibits depicting Indian-owned fee land, but there was no evidence to show whether such land has continuously been held in Indian hands. Unless previously allotted land, which became fee land and passed out of Indian hands, was taken back into trust by the United States, it is no longer part of the Yankton Sioux Reservation under the previous decision of the Eighth Circuit. *See Gaffey II*, 188 F.3d at 1030 (holding that the Yankton Sioux Reservation "has been further diminished by the loss of those land originally allotted to tribal members which have passed out of Indian hands."). Although the record was not fully developed regarding Indian-owned fee land, the Court finds it sufficient for purposes of this remand proceeding to define that category of land as reservation, which is subject to federal criminal jurisdiction under 18 U.S.C. § 1151(a). Whether a particular tract of previously allotted land is Indian-owned fee land that has continuously been held in Indian hands can be verified at any given time by the land title records maintained by the BIA's Realty Office.

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[6] If and when any of that land is sold to a non-Indian, then that land will no longer be a part of the Yankton Sioux Reservation. Who is and who is not an Indian is already well defined in the law

F. Dependent Indian Community

The Court has considered whether any of the trust lands at issue in this case qualify as Indian country under 18 U.S.C. § 1151(b)[7] as a dependent Indian community. During the trial, the Court questioned the Charles Mix County State's Attorney, Scott Podhradsky, about this possibility. He testified that based upon his predecessor's beliefs, there are three dependent Indian communities in Charles Mix County, which he identified as South Housing in Wagner, North Housing in Wagner and South Housing, just south of Lake Andes.

Other than the above, the record does not contain evidence as to what, if any, other areas might be dependent Indian communities. The Court recognizes that if the Indian population grows in some of the areas in question, other dependent Indian communities might develop.

To the extent any of the trust land discussed in this opinion would be found by an appellate court to not be "reservation" land, and thus not Indian country

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[7] Section 1151(b) provides

> Except as otherwise provided in section 1154 and 1156 of [Title 18], the term "Indian country", as used in this chapter, means . . . (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state. . .

18 U.S.C. § 1151(b)

under § 1151(a), the Court finds such trust land would nevertheless qualify as Indian country under § 1151(b), as a dependent Indian community. The Supreme Court established two requirements for off-reservation land to qualify as a dependent Indian community under § 1151(b): "a federal set-aside *and* a federal superintendence requirement." *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 530, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998). It was established at trial that all of the trust land identified in Revised Exhibits 202, 203, 204 and 211 (revised post-trial) has been set aside by the federal government in trust for the Indians residing within the original 1858 boundaries of the Yankton Sioux Reservation. The federal government exercises superintendence over these trust lands, as testified to by Ms. Orozo and FBI Agent Miller. Accordingly, these trust lands meet the two requirements for a dependent Indian community. Similar to the result of finding the trust lands are "reservation" under § 1151(a), as described in this opinion, a finding that the trust lands qualify as Indian country under § 1151(b) results in the Yankton Sioux Reservation being a checkerboard reservation.

III. CONCLUSION

Based upon the discussion above, the Court finds all the trust land and Indian-owned fee land that has continuously been held in Indian hands, which is within the original 1858 treaty boundaries of the Yankton Sioux Reservation, is Indian country under

18 U.S.C. § 1151(a). If any of the trust land is found by a superior court to not be "reservation" land, and thus not Indian country under 18 U.S.C. § 1151(a), such trust land qualifies as Indian country under 18 U.S.C. § 1151(b), as a dependent Indian community. Although it would be preferable for law enforcement and administrative purposes to have one line surrounding a wholly contiguous reservation, it appears from Charles Mix County State's Attorney Scott Podhradsky's testimony at trial that the federal, state, county and city law enforcement officers working on the Yankton Sioux Reservation have established a workable system regarding the exercise of criminal jurisdiction. Even if the Yankton Sioux Reservation as now diminished presented law enforcement problems, those problems would have to be countenanced for the Reservation as diminished is what varying federal Indian policies have created. Thus, while the checkerboard reservation is not the ideal result from the various points of view of any of the parties, the exercise of checkerboard federal criminal jurisdiction on the Yankton Sioux Reservation is a workable law enforcement environment. The busy criminal docket before this Court from the Yankton Sioux Reservation confirms that observation. Aside from those observations, the Indians are entitled by law to their reservation, diminished as it is. Accordingly,

IT IS ORDERED:

1. That a Declaratory Judgment will be entered in favor of the Plaintiffs and Plaintiff-Intervenor declaring that the following

categories of land within the original 1858 treaty boundaries of the Yankton Sioux Reservation remain part of the reservation and are Indian country under 18 U.S.C. § 1151(a):

a) land reserved to the federal government in the Act of Aug. 15, 1894, Ch. 290, 28 Stat. 286, 314-19, and then returned to the Yankton Sioux Tribe;

b) land allotted to individual Indians that remains held in trust;

c) land taken into trust under the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-77); and

d) Indian owned fee land that has continuously been held in Indian hands.

2. That, other than the declaratory relief granted in paragraph 1 above, all of Plaintiffs', Plaintiff-Intervenor's and Defendants' claims asserted in this action as to the boundaries of the Yankton Sioux Reservation are denied.

JUDGMENT

In accordance with the Memorandum Opinion and Order filed this date with the Clerk,

IT IS ORDERED, ADJUDGED AND DECREED that Judgment is entered in favor of the Plaintiffs and the Plaintiff-Intervenor to the extent that the

Court declares the following categories of land within the original 1858 treaty boundaries of the Yankton Sioux Reservation remain part of the reservation and are Indian country under 18 U.S.C. § 1151(a):

a) land reserved to the federal government in the Act of Aug. 15, 1894, Ch. 290, 28 Stat. 286, 314-19, and then returned to the Yankton Sioux Tribe;

b) land allotted to individual Indians that remains held in trust;

c) land taken into trust under the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-77); and

d) Indian owned fee land that has continuously been held in Indian hands.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, with the exception of the declaratory relief granted immediately above, all of Plaintiffs', Plaintiff-Intervenor's and Defendants' claims asserted in this action as to the boundaries of the Yankton Sioux Reservation are denied.

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599 N.W.2d 364

Supreme Court of South Dakota.
James BRUGUIER, Petitioner and Appellant,
v.
Joseph CLASS, Warden, South Dakota State Penitentiary, Appellee.
No. 20216.

Argued Jan. 13, 1999.
Decided Sept. 1, 1999.
Rehearing Denied Oct. 7, 1999.

John M. Wilka of Wilka, Haugen & Kirby, P.C., Sioux Falls, for petitioner and appellant.

Mark Barnett, Attorney General, John P. Guhin, Deputy Attorney General, Pierre, for appellee.

KONENKAMP, Justice.

[¶ 1.] In this appeal, we must again decide the status of certain lands lying within the 1858 boundaries of the Yankton Sioux Reservation. By habeas corpus petition, James Bruguier challenges state jurisdiction in Pickstown, the place of his criminal offense. The United States Supreme Court in *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) [*Yankton Sioux Tribe*], held that *unallotted* lands ceded to the United States were subject to state jurisdiction. Here we must decide the status of *allotted* lands, which have passed into non-Indian ownership. We conclude that this territory is not Indian country as defined by federal law, and therefore South Dakota properly

maintains jurisdiction. We affirm the decision denying Bruguier's habeas petition.

A

[¶ 2.] A jury found James Bruguier guilty of first degree burglary on August 21, 1992. He later pleaded guilty to being a habitual offender. On appeal, we affirmed. *State v. Bruguier,* 510 N.W.2d 126 (S.D.1993). He committed the burglary in Pickstown, South Dakota, which lies within the original 1858 boundaries of the Yankton Sioux Indian Reservation. His first petition for writ of habeas corpus was denied, but based on the U.S. District Court's decision in *Yankton Sioux Tribe v. Southern Missouri Waste Management District,* 890 F.Supp. 878 (D.S.D.1995), concluding that the 1858 Reservation remained intact, Bruguier filed a second petition. The circuit court also denied that petition, based on our decision in *State v. Greger,* 1997 SD 14, 559 N.W.2d 854. While his appeal to this Court was pending, the United States Supreme Court decided *Yankton Sioux Tribe,* 522 U.S. at 329, 118 S.Ct. at 789. We then remanded his case for a decision on whether the burglary occurred on land retaining reservation or Indian country status under 18 USC § 1151.

[¶ 3.] The parties stipulated that the offense occurred on allotted land to which Indian title had been extinguished, but left to the habeas judge to decide whether the land remained Indian country under federal law. The court found that the place

where the offense was committed lies on formerly allotted land, "the Indian title to which has been long extinguished [and] is now held in fee title by non-Indians."[1] Also, the court concluded the reservation had been disestablished and that no lands within the former 1858 boundaries now constitute a reservation under 18 USC § 1151; therefore, the offense did not occur in Indian country and state jurisdiction was proper. Bruguier's petition for writ of habeas corpus was denied. On the same day the circuit court signed its findings, the U.S. District Court ruled that the 1858 boundaries remain intact, thus by inference making Pickstown Indian country. *Yankton Sioux Tribe v. Gaffey,* 14 F.Supp.2d 1135 (D.S.D.1998) [*Gaffey*]. Bruguier now appeals.[2] Jurisdiction may be properly challenged through a habeas petition. *Flute v. Class,* 1997 SD 10, ¶ 8, 559 N.W.2d 554, 556 (citing *Weiker v. Solem,* 515 N.W.2d 827, 830 (S.D.1994)).

B

[¶ 4.] The legal history of the Yankton Sioux Reservation is described in *Yankton Sioux Tribe,* 522 U.S. at 329, 118 S.Ct. at 789, and *Greger,* 1997 SD 14,

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[1] See the shaded Pickstown map in the *Gaffey* Joint Appendix, Volume V, at 1379, Briefs from *Yankton Sioux Tribe, et al v Gaffey, et al* (8thCir 1999)

[2] In this instance, our review of the circuit court's decision is de novo as we are deciding "whether the established facts fall within the relevant legal definition." *Falls v Nesbitt,* 966 F 2d 375, 377 (8thCir.1992).

559 N.W.2d at 854. We address only those particulars bearing on the present question. The Yankton Sioux Indian Reservation was created by the 1858 Yankton Treaty of Cession. *Greger,* 1997 SD 14, ¶ 3, 559 N.W.2d at 857. With the passage of the General Allotment (Dawes) Act in 1887, the Yankton Reservation was to be partitioned with parcels to be assigned to individual tribal members.[3] In 1892, the Tribe and the United States negotiated a second treaty, which Congress ratified in 1894. *Id.* ¶¶ 1, 4. By this agreement, for a "sum certain," the Tribe "ceded, sold, relinquished and conveyed" all its unallotted reservation lands to the United States. *Id.* ¶ 1.

[¶ 5.] After President Cleveland's proclamation opened the unallotted lands for settlement in 1895, the area filled with settlers. The history is recounted in the writings of author and journalist, Adeline S. Gnirk.[4] In her retelling, the Chicago, Milwaukee & St. Paul Railroad secured a right-of-way in 1897 to extend its line through the opened reservation from Napa to the place where the town of Platte was later

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[3] Professor Herbert Hoover points out that certain lots were earlier assigned or distributed to Yankton "families." In 1869, 177 80-acre lots were surveyed and in 1874, additional 40-acre lots were surveyed. The General Allotment Act invalidated all the "family" assignments and provided for "individual" allotments. Herbert Hoover, A Yankton Sioux Tribal Land History 5 (1995).

[4] A. Gnirk, The Epic of the Realm of Ree (1984); A. Gnirk, The Epic of the Great Exodus (1985); A. Gnirk, The Epic of Papineau's Domain (1986).

founded. The railbed was completed in 1900. Within a year four townsites originated along the railway: Wagner, Lake Andes, Geddes and Platte. Dante and Ravinia were soon added as railroad stops. The region was transformed. Typical perhaps is the rise of Lake Andes, which was platted in 1901 and formally established as a town in 1904.

When inherited Indian lands commenced to be sold, a location was secured on Section 4, the present site. This land including the 80 acres then platted and the 120 acres adjoining had been allotted to John Arthur, or Sparrow Hawk. He died and in 1904 his only heirs, his wife Taniyawakanwin, and daughter Bessie Zitka Koyewin were induced to sell 80 acres of this land to the Lake Andes Townsite Company.

Gnirk, Papineau's Domain, *supra* note 4, at 143, *cited in Gaffey* Joint Appendix, at 765. Even during the twenty-five year trust period required by the Dawes Act, Article XI of the 1894 Act allowed for the sale of allotted lands on the death of certain allottees. By 1916, Lake Andes won a decade-long battle with the other railroad towns to become the county seat, replacing Wheeler. Construction on the new courthouse began in 1917. The town remains the county seat to this day. Its courthouse and law enforcement center both sit on formerly allotted land.

[¶ 6.] For the Yanktons, too, life changed dramatically.

> Immediately after initial allotment proceedings ended in 1894, agency officials divided

> the reservation into two farm jurisdictions to hasten the adjustment of adults. . . . [They were taught] techniques of using horse-drawn machinery, selective livestock breeding, dry farming on arid land, and maintaining agricultural equipment.

Herbert T. Hoover & Leonard R. Bruguier, The Yankton Sioux 46 (1988). Tribal government quickly faded and became nonexistent. Indeed, the agency Superintendent in 1903 "declared that tribal government by chiefs was a thing of the past." *Id.* at 53. Even the tribal business committee disappeared, until revived years later. *Id.* The Court of Indian Offenses, which dealt with crimes by Indians against Indians on allotted land, was abolished in 1909. As the habeas court found, "[o]f the approximately 260,000 acres originally allotted to Indians, by 1913, just twenty-one years later, the tribal members held only 70,000 acres. . . . They had thus divested themselves of over 190,000 acres. By 1930, tribal members owned only 43,358 acres." The federally supported agency boarding school closed in 1919 and its students transferred to county public schools. Yanktons were added to the county jury list and several were elected or appointed to county and local offices, including clerk of courts, constable, election judge and clerk.

[¶ 7.] The present character of the area reflects the turn of the century changes that followed the reservation opening. From the 262,000 acres originally allotted, only about fifteen percent remain in Indian hands. "Today, the total Indian holdings in the region

consist of approximately 30,000 acres of allotted land and 6,000 acres of tribal land." *Yankton Sioux Tribe*, 522 U.S. at 339, 118 S.Ct. at 796 (citing Indian Reservations: A State and Federal Handbook 260 (1986)).

C

[¶ 8.] Bruguier committed burglary at a home in the state-chartered municipality of Pickstown. Although a substantial portion of the site on which Pickstown rests is former allotment land, none of it is now held by the Tribe or in trust. Pickstown has its own unique origin. Named for General Lewis A. Pick of the Corps of Engineers, the town was established in 1946. The U.S. Army Corps of Engineers created it as part of the Fort Randall Dam project to accommodate workers and their families. *See generally* Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944) (codified as amended at 16 USC § 460d (1976)).[5] To permit building hydroelectric and flood control dams on the Missouri River, supporting enactments authorized the taking of portions of certain Indian reservations, including the nearby Crow Creek Sioux and Lower Brule Reservations.[6] In

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[5] Also known as the Pick-Sloan Missouri River Basin program

[6] *See* Act of October 3, 1962, Payment for Lands of Crow Creek Sioux Reservation, Pub. L. No. 87-735, 76 Stat. 704; Act of October 3, 1962, Payment for Lands of Lower Brule Sioux Reservation, Pub L. No 87-734, 76 Stat 698; Act of September 2, 1958, Payment for Lands to Lower Brule Sioux Tribe, Pub L No. 85-923, 72 Stat. 1773; Act of September 2, 1958, Payment for

(Continued on following page)

those enactments the text mentions taking "reservation" land. In contrast, the body of the eminent domain statute dealing with the Yankton Sioux refers to taking only "tribal and allotted lands," but the title in the original enactment (Pub. L. No. 83-478) does refer to the Yankton Sioux Reservation.[7] *See* 43 USC § 1200e (68 Stat. 453 (1954)) (authorizing expenditure to relocate tribal members "who reside or have resided, on tribal and allotted lands acquired by the United States for the Fort Randall Dam and Reservoir project"). This latter law also provided that "title to any lands acquired within Indian country pursuant to this section shall be taken in the name of the United States in trust for the Yankton Sioux Tribe or members thereof."

[¶ 9.] In 1957, by authority of the Federal Property and Administrative Services Act of 1949, Pub. L. No. 63-152, 63 Stat. 378, allowing disposal of surplus federal property to stimulate industrial development, Pickstown was designated by Congress

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Lands to Crow Creek Sioux Indians, Pub. L. No. 85-916, 72 Stat. 1766, Act of September 2, 1958, Oahe Dam and Reservoir Project, Pub. L. No. 85-915, 72 Stat. 1762 (Standing Rock Sioux Tribe); Act of September 3, 1954, Pub. L. No. 83-776, 68 Stat. 1191 (Oahe Dam-Cheyenne River Tribe); Act of October 29, 1949, Pub. L. No. 81-437, 63 Stat. 1026 (Garrison Dam-Fort Berthold Tribe).

[7] The title to this Act refers to the "Yankton Sioux Indian Reservation." Yet within the body of this enactment only Lower Brule and Crow Creek are referred to as reservations. Whereas, the body of this law refers to Yankton "tribal and allotted lands."

as an area eligible, upon Indian request, for transfer without cost to an Indian tribe or other Indian entity. *See* 25 USC 463(d) (1997). Apparently, no transfer took place. In 1985, Congress relinquished this land to the municipal corporation serving the people of Pickstown.

> TRANSFER OF FEDERAL TOWNSITES
>
> (a)(1) Except as otherwise provided in this Act and notwithstanding any other provision of law, the Secretary of the Army shall transfer, without consideration and without warranty of any kind, all rights, title, and interests of the United States in each of the following described lands (including all improvements on such lands) to the municipal corporation serving the inhabitants of such land as soon as possible after the incorporation of such municipal corporation:
>
> * * *
>
> (B) The land referred to as Pickstown, South Dakota, consisting of 393 acres, more or less. . . . .

Supplemental Appropriations Act of 1985, Pub. L. No. 99-88, ch. VI, 99 Stat. 293, 317. This law was later amended "by striking out 'without warranty of any kind' and inserting in lieu thereof 'by warranty deed, said deed to include a covenant to defend title to the

property.'" Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082, 4242.[8]

[¶ 10.] We appreciate, of course, that a federally authorized townsite may still be Indian country if it exists within the boundaries of an Indian reservation, even after title has been transferred in fee to non-Indians. *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 358-59, 82 S.Ct. 424, 428-29, 7 L.Ed.2d 346 (1962). In addition, reservation land taken by eminent domain will not necessarily extinguish reservation boundaries. *Lower Brule Sioux Tribe v. State of South Dakota*, 711 F.2d 809 (8th Cir.1983). Yet, when read together, these enactments appear incompatible with any conception of this region as part of an existing Indian reservation. No reference is made to taking "reservation" land from the Yankton Sioux in the various flood control takings statutes. And Congress must not have considered Pickstown Indian country taken in trust for the Yankton Tribe or its members, for it was not returned to them, but to the municipal corporation.

[¶ 11.] Nonetheless, the Federal Government has been inconsistent in its references to the Yankton

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[8] The amendment also conveyed an additional twenty-three acres of land used by Pickstown as a sanitary landfill. The Corps of Engineers retained a 9-acre tract where maintenance buildings and an office building are located. The office building houses the town's Post Office and Credit Union under lease. Also retained was a cold storage warehouse and immediate land located on a 16-acre tract.

Reservation over the past century. We think it prudent, therefore, to analyze the question further under traditional Indian law standards established by the Supreme Court. *See Yankton Sioux Tribe*, 522 U.S. at 354, 118 S.Ct. at 803 ("Congress and the Executive Branch have described the reservation in contradictory terms and treated the region in an inconsistent manner.").

D

[¶ 12.] "Interpretation of federal law is the proprietary concern of state, as well as federal, courts." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 275, 117 S.Ct. 2028, 2037, 138 L.Ed.2d 438 (1997). Indeed, the jurisdictional issue here is as vital to South Dakota as it is to the Yankton Sioux Tribe and the Federal Government; thus, it is proper for this Court to determine where state jurisdiction lies.[9] Whether land falls within a reservation or constitutes Indian country "depends upon the interpretation and application of federal law." *Seymour*, 368 U.S. at 353, 82 S.Ct. at 426.

[O]nly Congress can divest a reservation of its land and diminish its boundaries. Once a block of

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[9] For this reason, we have received and reviewed all the briefs and exhibits submitted to the Eighth Circuit Court of Appeals in *Yankton Sioux Tribe v. Gaffey*. The status of approximately 222,000 acres of formerly "allotted" land now owned by non-Indians in southern Charles Mix County is open to uncertainty

land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.

Solem v. Bartlett, 465 U.S. 463, 470, 104 S.Ct. 1161, 1166, 79 L.Ed.2d 443 (1984) (citing *United States v. Celestine*, 215 U.S. 278, 285, 30 S.Ct. 93, 94-95, 54 L.Ed. 195 (1909)); *see also Yankton Sioux Tribe*, 522 U.S. at 343, 118 S.Ct. at 798 ("[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation."); *DeCoteau v. District County Court for the Tenth Judicial Dist.*, 420 U.S. 425, 444, 95 S.Ct. 1082, 1092-93, 43 L.Ed.2d 300 (1975) (after a reservation has been created "all tracts included within it remain a part of the reservation until separated therefrom by Congress"); Monroe Price & Robert Clinton, Law and the American Indian 96 (2d ed. 1973) ("Once a reservation has been established, or a dependent Indian community shown to exist, it will remain Indian country until terminated by Congress, irrespective of the nature of the land ownership.").

[¶ 13.] Congressional intent to terminate a reservation is not "lightly found" and ambiguities are to be resolved against it. *Hagen v. Utah*, 510 U.S. 399, 411, 114 S.Ct. 958, 965, 127 L.Ed.2d 252 (1994) (citations omitted); *see also DeCoteau*, 420 U.S. at 444, 95 S.Ct. at 1092-93. Intent to remove land from reservation status must be clearly manifested. *DeCoteau*, 420 U.S. at 444, 95 S.Ct. at 1093. Without

unambiguous intent, the general rule that "doubtful expressions" are construed in a light most favorable to the Indians, applies to our review of statutory and treaty language. *Id.*

E

[¶ 14.] The Federal Government generally has jurisdiction over Indian country, along with the Indian Tribe inhabiting it. *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n. 1, 118 S.Ct. 948, 952 n. 1, 140 L.Ed.2d 30 (1998) [*Venetie*]. Bruguier contends that whatever their present ownership, all originally allotted lands maintain Indian country status under 18 USC § 1151(a), as they lie within the 1858 boundaries of the Yankton Sioux Indian Reservation.[10] He believes that nothing in the negotiations, the treaty, or the later development in the territory suggests that sales of *allotted* land to non-Indians would diminish the reservation beyond what the sale of the *unallotted* land accomplished. On the other hand, the State argues, based on *Greger*, that the reservation was disestablished by the 1894 Act, leaving as Indian country only Indian retained allotments and tribally owned land.[11]

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[10] This was essentially the U.S. District Court's decision in *Gaffey*, 14 F.Supp 2d at 1135

[11] As we were only dealing with the question whether the sale of all unallotted lands shrunk the boundaries of the reservation, *Greger* found the reservation had been *diminished*, rather than *disestablished*

[¶ 15.] Our task is to decide whether Pickstown is Indian country. More precisely, the question is whether parcels originally allotted to individual Yanktons compose part of a permanent reservation under 18 USC § 1151(a), or whether only those allotments still held in Indian hands are Indian country under 18 USC § 1151(c).[12] Three categories of land qualify as Indian country under 18 USC § 1151. First, § 1151(a) includes as Indian country those lands within the boundaries of a reservation under United States Government jurisdiction. Second, § 1151(b) defines Indian country as "all dependent Indian communities" within the United States. We need not address this subsection as no one in this appeal contends the Pickstown site or any other place on similarly non-retained allotment land is a "dependent Indian community." Third, § 1151(c) includes as

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[12] 18 USC § 1151 provides:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same

Indian country all Indian allotments that have not lost their Indian titles.[13]

[¶ 16.] In *State ex rel. Hollow Horn Bear*, 77 S.D. 527, 95 N.W.2d 181 (1959), we interpreted 18 USC § 1151 to mean that subsection (a) encompasses those areas within a reservation, and that subsection (c) applies to those lands standing outside reservation boundaries.

> If subsection (a) is to receive a literal interpretation a patent to allotted lands within the limits of such a reservation which operated to extinguish the Indian title would not remove such a tract from Indian country, but

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[13] 18 USC § 1151 was enacted in 1948 The Reviser's Note to the statute indicates that the definition of Indian country was derived from "the latest construction of the term by the United States Supreme Court." 18 USC § 1151 reviser's note Congress used language from *United States v McGowan*, 302 U.S 535, 58 S Ct. 286, 82 L Ed 410 (1938), *United States v Pelican*, 232 U S 442, 34 S.Ct. 396, 58 L Ed. 676 (1914), *United States v. Sandoval*, 231 U.S. 28, 34 S Ct 1, 58 L Ed. 107 (1913), and *Donnelly v. United States*, 228 U S. 243, 33 S Ct 449, 57 L Ed 820 (1913). In *Pelican*, the Court decided whether an Indian allotment that was once part of the Colville Indian Reservation but was situated in a part of the reservation that had been opened to settlement by Congress was Indian country. 232 U S at 444-45, 34 S.Ct at 397. The Colville Indian Reservation was included in the definition of Indian country, as it had "been segregated from the public domain" *Id.* at 445, 34 S Ct at 397. The Court concluded that because the land was an allotment held in trust for an individual Indian, the federal government still retained criminal jurisdiction over this land, even though the land lay in the diminished part of the reservation *Id* at 447, 34 S.Ct at 398

> under subsection (c) such a patent would so operate. Hence, it seems logical to believe that the Congress intended subsection (a) to apply to the closed area of reservations, and (c) to apply to allotted lands in open territory.

Hollow Horn Bear, 95 N.W.2d at 185. If the only Indian country remaining is land the Yankton Tribe acquired long after the 1894 Act, along with remaining Indian owned allotments under § 1151(c), then the Yankton Sioux Reservation may be considered congressionally terminated.

F

[¶ 17.] In *Yankton Sioux Tribe*, the Supreme Court ruled that "Congress diminished the Yankton Sioux Reservation in the 1894 Act, that the unallotted tracts no longer constitute Indian country, and thus . . . the State has primary jurisdiction over . . . lands ceded under the Act." 522 U.S. at 358, 118 S.Ct. at 805. The Court limited its holding to deciding only that the "unallotted, ceded lands were *severed* from the reservation[.]" *Id.* (emphasis added). Left undecided was whether there now exists any reservation boundary, and if so, where it lies. We conclude, the boundaries created in the 1858 Treaty no longer exist because no provision was made in the 1894 Act to delineate any boundary, as in the 1858 Treaty. In most instances, when a reservation is diminished, its boundaries "shrink." *Solem*, 465 U.S. at 471, 104 S.Ct. at 1166. Indeed, the Supreme Court in *Yankton*

Sioux Tribe found that the 1894 Act is "readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries." 522 U.S. at 345, 118 S.Ct. at 799.

[¶ 18.] Even with the 1858 boundaries extinct, however, we still must return to the Supreme Court's traditional three-factor "analytical structure" to decide the status of the lands left unresolved in *Yankton Sioux Tribe. Hagen,* 510 U.S. at 411, 114 S.Ct. at 965.

> The most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands. We have also considered the historical context surrounding the passage of the surplus land Acts, although we have been careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage. Finally, "[o]n a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation."

Id. (internal citations omitted) (quoting *Solem,* 465 U.S. at 471, 104 S.Ct. at 1166-67). *Yankton Sioux Tribe* and *Greger* scrutinized these three factors. We need not repeat all their conclusions here. Instead, we will touch on those points deemed more ambiguous.

1. Statutory Language

[¶ 19.] Articles I and II of the 1894 Act provided that the Yankton Tribe did "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation" and that in consideration for the "lands ceded, sold, relinquished, and conveyed" the United States agreed to pay a sum certain of $600,000. *Yankton Sioux Tribe,* 522 U.S. at 344, 118 S.Ct. at 798; *Greger,* 1997 SD 14, ¶ 4, 559 N.W.2d at 858. Equivalent language signaled termination of the reservation in *DeCoteau,* where the Supreme Court noted that such terminology was "precisely suited" to such purpose. 420 U.S. at 445, 95 S.Ct. at 1093. Being the most probative evidence, this cession language manifests an almost irrebuttable presumption of congressional intent. *Greger,* 1997 SD 14, ¶ 1, 559 N.W.2d at 855-56. Yet, other clauses in the Act are less absolute. Are these so uncertain as to negate the nearly conclusive import of the cession language? To appreciate the idiom of the 1894 Act, it is first important to understand the genesis of the allotment system and the legal notion of Indian ownership of reservations at that time.

[¶ 20.] Many well-meaning reformers, legislators, and federal officials viewed reservations as interim solutions to eventual Native American assimilation. When compressed, they theorized, Indian "detribalization" and "Americanization" would take

place.[14] Reservations, therefore, were expected to have a limited life span. Arrell Morgan Gibson, The American Indian, Prehistory to the Present, 452, 486, 489, 491 (DCHeath & Co 1980). The Dawes Act had the dual goal of hastening the "detribalizing" process and opening reservation land to "homeseekers." *Id.* at 494-95, 498, 506. *See also Solem*, 465 U.S. at 468, 104 S.Ct. at 1165 (surplus land acts anticipated imminent demise of reservations and were enacted partly to facilitate the process). It would end common ownership by tribes, as well as the tribal way of life.

Under the practice of allotting lands in severalty to individual Indians, title to the allotted land was held in trust by the Government for the benefit of the allottee, or vested in the allottee subject to a restraint

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[14] As one historian expressed:

> For more than one-half century, sincere friends of the Indians had been advocating the individual ownership of land as the salvation of any Indian who would accept it Like other mistaken policies it was all part of the centuries-old aim of changing Indians into white people Break up their natural grouping, whether by abolishing the government of advanced tribes or undermining the influence of primitive chiefs, and set each family alone on a farm to develop habits of industry and the pride of possession The Indians' friends also argued that only a fee simple title would protect their land from the insecurity of reservation and treaty guarantees

Angie Debo, A History of the Indians of the United States 299 (UOkPress 1970).

against alienation. Obviously, in either case tribal title is not involved.

Felix Cohen, Handbook of Federal Indian Law 7-8 (1st ed. reprint 1986). The allotment system later proved a dreadful failure, but at the time it was assumed that, for the benefit of assimilation and civilization, Indian and non-Indian families would intersperse over the opened reservations, making tribal existence and governance obsolete. *Solem*, 465 U.S. at 468, 104 S.Ct. at 1165. These philosophic assumptions emerge in the negotiations between Government representatives and Yankton Tribe members, where both sides spoke of tribal life as soon to be outdated. *Yankton Sioux Tribe*, 522 U.S. at 353, 118 S.Ct. at 803 (citing Report of the Yankton Indian Commission (Mar. 31, 1893), at 19, *reprinted in* S. Exec. Doc. No. 27, 53d Cong., 2d Sess., 9-11 (1894); S Misc. Doc. No. 134, 53d Cong., 2d Sess., 1 (1894)).

[¶ 21.] The Government's notion of Indian ownership and how it legally ended can be seen in congressional enactments and early Supreme Court decisions. In 1834, Congress statutorily defined Indian country. It upheld the communal objective of tribal communities with the understanding that once title to Indian land was extinguished, the land was no longer in Indian ownership.

> That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not

> within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be Indian country.

Act of June 30, 1834, Pub. L. No. 23-161, 4 Stat. 729. When the U.S.Code was revised, however, this section was not included, effectively repealing it. Cohen, *supra,* at 6. The definition, nevertheless, shows that even in early usage of the term Indian country, Congress intended it to include only those lands to which Indian title had not been extinguished.

[¶ 22.] After repeal of 1834 definition of Indian country, the Supreme Court in *Bates v. Clark,* 95 U.S.(5 Otto) 204, 24 L.Ed. 471 (1877), defined the term:

> The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.

Id. at 208; *see* Cohen, *supra,* at 7 (explaining the origin of the definition of Indian country). *See generally Perrin v. United States,* 232 U.S. 478, 34 S.Ct. 387, 58 L.Ed. 691 (1914). In *Greger,* we observed that "*Perrin*'s notion of Indian country was consistent with

the view at the time that reservations included 'only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians.'" 1997 SD 14, ¶ 8, 559 N.W.2d at 860 (quoting *Solem*, 465 U.S. at 468, 104 S.Ct. at 1165). In sum, Indian title in common, or put another way, tribal title, ended when tribal ownership ended. *Yankton Sioux Tribe*, 522 U.S. at 346, 118 S.Ct. at 798, (citing *Solem*, 465 U.S. at 468, 104 S.Ct. at 1164) (tribal ownership coextensive Indian ownership).

[¶ 23.] Noteworthy in the 1894 Act is the absence of any provision for tribal ownership. No land was reserved even for tribal purposes.[15] By eliminating tribal ownership, the "common understanding of the time" was that a "critical component of reservation status" was lost. *Yankton Sioux Tribe*, 522 U.S. at 346, 118 S.Ct. at 799. Individual Indians received their allotments and, except for agency and school land, all the rest was sold and opened for homesteads and townsites. It was not until the following century that Indian ownership and tribal ownership were legally distinguished in identifying Indian country.

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[15] It was decades after the reservation was opened that the Tribe acquired land from the Government that the United States no longer needed. Act of February 13, 1929, Pub. L. No. 70-729, 45 Stat. 1167 (returning to Tribe 1000 acres titled in United States that had been reserved in the 1894 Act for "agency, school, and other purposes").

By then, of course, more tolerant and enlightened notions of preserving aboriginal self-determination and culture gained ascendancy. Congressional enactments suitably followed. Congress has "plenary power over Indian affairs, including the power to modify or eliminate tribal rights." *Id.* at 343, 118 S.Ct. at 798 (citations omitted); *see also Sandoval*, 231 U.S. at 46, 34 S.Ct. at 5-6 ("Congress . . . has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease."). With this background in mind, we examine a few of the purportedly discrepant provisions in the 1894 Act.

[¶ 24.] The Supreme Court in *Yankton Sioux Tribe* expressed some misgivings on the import of certain language in Article VIII.

> Although we agree with the State that the school sections clause reinforces the view that Congress intended to extinguish the reservation status of the unallotted land, a somewhat contradictory provision counsels against finding the reservation terminated. Article [VIII] of the 1894 Act reserved from sale those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes." In *Solem*, the Court noted with respect to virtually identical language that "[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation." 465 U.S. at 474, 104 S.Ct. at 1168.

Yankton Sioux Tribe, 522 U.S. at 350, 118 S.Ct. at 801. Reserving to the United States lands for agency, school and other purposes suggests continued Government support for tribal members, and possibly evinces the notion of a continuing reservation. Yet, the uncertainty of this provision cannot carry the significance it did in *Solem*. There, the critical cession language was not suited to finding intent to terminate the reservation.

[¶ 25.] In keeping with the Dawes Act's twenty-five year trust period following the allotting process, setting aside government land for school and agency purposes was common, even for a terminated reservation.[16] In the 1891 treaty with the Sisseton-Whapeton Tribes, it was understood that on the Lake Traverse Reservation, the United States would continue to own land for school and agency purposes. *See DeCoteau*, 420 U.S. at 435 n. 16, 95 S.Ct. at 1088 n. 16 ("Government should own the lands upon which the agency and school building are located."); *id.* at 438 n. 19, 95 S.Ct. at 1089 n. 19 ("'Indian title'" to lands occupied by the "'agency and missionary society'" will be "'extinguished'" (citation omitted)). Moreover, reserving such "lands for Indian schools, religious missions, and service agencies" did not preclude finding congressional intent to disestablish a part of the Rosebud Reservation. *See Rosebud Sioux Tribe v. Kneip*, 430

[16] After the opening, federal officials provided assistance to help the Yanktons' transition into agriculturists. *See* Hoover & Bruguier, *supra*, at 46

U.S. 584, 622, 97 S.Ct. 1361, 1381, 51 L.Ed.2d 660 (1977)(Marshall, J., dissenting).

[¶ 26.] Another provision that bears further scrutiny is Article XIV of the 1894 Act:

> All allotments of land in severalty to members of the Yankton tribe of Sioux Indians, not yet confirmed by the Government, shall be confirmed as speedily as possible, correcting any errors in same, and *Congress shall never pass any act alienating any part of these allotted lands from the Indians.*

(emphasis added). This, too, is consistent with the initial twenty-five year trust relationship. At the time of negotiations, much of the land to be allotted had yet to be processed. Though opposed to partitioning their land when the Dawes Act first passed, Yankton tribal members expressed concern during the 1892 negotiations with the slowness of the approval process. A history of broken promises and failures to deliver timely, adequate provisions as part of the 1858 Treaty created understandable Yankton skepticism about whether all the allotments would be distributed. Taken in context, this provision simply assured that those entitled to allotted parcels would receive them as soon as possible, and once received, they would not be taken away. Nothing in this provision can be interpreted as precluding individual Indian owners from later transferring their property to non-Indians after the trust period expired.

[¶ 27.] Even if the more uncertain provisions of the 1894 Act cannot be wholly explained, congressional intent to end the Yankton Reservation is sufficiently clear in its "precisely suited" cession language. As the Supreme Court noted with respect to the Article XVIII saving clause, "'it is a commonplace of statutory construction that the specific' cession and sum certain language in Articles I and II 'governs the general' terms. . . ." *Yankton Sioux Tribe*, 522 U.S. at 348, 118 S.Ct. at 800 (citation omitted).

2. Historical Context

[¶ 28.] Although there are inconsistencies in this sphere also, we find little in the historical context or the Treaty negotiations to suggest that the reservation would continue. "[T]he record of the negotiations between the Commissioners and the Yankton Tribe contains no discussion of the preservation of the 1858 boundaries. . . ." *Id.* at 347, 118 S.Ct. at 800.

> [T]he Commissioners' report of the negotiations signaled their understanding that the cession of the surplus lands dissolved tribal governance of the 1858 reservation. They observed that "now that [members of the Tribe] have been allotted their lands in severalty and have sold their surplus land – the last property bond which assisted to hold them together in their tribal interest and estate – their tribal interests may be considered a thing of the past." And, in a March, 1894, letter to the Chairman of the Senate Committee on Indian Affairs, several Yankton chiefs and

> members of the Tribe indicated that they concurred in such an interpretation of the agreement's impact. The letter urged congressional ratification of the agreement, explaining that the signatories "want[ed] the laws of the United States and the State that we live in to be recognized and observed," and that they did not view it as desirable to "keep up the tribal relation . . . as the tribal relation on this reservation is an obstacle and hindrance to the advancement of civilization."

Id. at 353, 118 S.Ct. at 802-03 (internal and other citation omitted). Implicit in the negotiations was an opened area without boundaries; explicit was an end to tribal existence upon the distribution of allotments and the sale of unallotted lands. Without tribal existence, without communal land, the historical context points to an understanding that the reservation would no longer continue to exist. As the Supreme Court wrote in *Yankton Sioux Tribe*, "[i]n this case, although the context of the Act is not so compelling that, standing alone, it would indicate diminishment, neither does it rebut the 'almost insurmountable presumption' that arises from the statute's plain terms." 522 U.S. at 351, 118 S.Ct. at 802 (citation omitted).

3. Resultant Developments in the Area

[¶ 29.] We recognize that a "surge in non-Indian settlement" is the "least compelling" proof in our

examination of this question. *Id.* at 356, 118 S.Ct. at 804. It was congressional intent in passing the 1894 Act that primarily controls the analysis and not the later movements of settlers and others. Yet we cannot ignore the palpable reality that, as the years passed after the 1895 opening, no one *behaved* as if the reservation remained in existence, not the Federal Government, not the Yankton Sioux, not the State, not the homesteaders, not the townspeople. However carefully we may pore over the thousands of words in treaty negotiations, in chronicles, in agency reports, in statutes, in latter day scholarly exegesis, we cannot ignore the historical actuality of what happened following the opening. The area was utterly transformed.

[¶ 30.] Following a recurrent theme, first came the settlers, then the railroads, then the towns, and businesses. This precipitous change in regional character is undeniable. If not dispositive of the question, it certainly has a persuasive bearing on our decision. Later actions may elucidate what Congress expected and here "the area remains 'predominantly populated by non-Indians with only a few surviving pockets of Indian allotments,' and those demographics signify a diminished reservation." *Id.* at 356-57, 118 S.Ct. at 804 (quoting *Solem*, 465 U.S. at 471 n. 12, 104 S.Ct. at 1167 n. 12).

[¶ 31.] With the opening of the reservation came law and order administered by the State, with few

exceptions.[17] No distinction was made between ceded lands and allotted lands that passed out of Indian hands. The "single most salient fact [relating to later jurisdictional history] is the unquestioned actual assumption of state jurisdiction. . . ." *Rosebud Sioux Tribe,* 430 U.S. at 603, 97 S.Ct. at 1371. In *Yankton Sioux Tribe,* the Supreme Court considered this factor influential: "The State's assumption of jurisdiction over the territory, almost immediately after the 1894 Act and continuing unchallenged to the present day, further reinforces our holding." 522 U.S. at 357, 118 S.Ct. at 804. The only areas still treated as Indian country were the allotted lands, which remained under Indian ownership. Later, when the Tribe acquired certain lands, they were also considered out of the State's jurisdiction.

[¶ 32.] In the century following the opening of the reservation, the Yanktons themselves referred to their common land or "reservation" as a "mile square." *Greger,* 1997 SD 14, ¶ 5, 559 N.W.2d at 859. At the time of the 1894 Act, this "reservation" was federal agency land, as reserved in Article VIII, not tribal or common land. Even more significantly, both the 1932 Yankton Tribal Constitution and the amended Constitution of 1962 defined the Tribe's property as including only those tribal lands currently owned

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[17] Those exceptions have to do with tribal police and federal officials dealing with matters on trust lands, which, as we know, quickly dwindled.

by the Tribe. Not until 1990 was the Yankton Constitution amended to encompass all lands and waters within the 1858 Treaty boundaries. This belated reclamation cannot overcome a century of development and reliance at odds with it, much less the congressional intent in the 1894 Act.

[¶ 33.] We see little evidence to depart from our previous conclusion on this point in *Greger*.

> Today, less than ten percent of the land within the 1858 Treaty boundaries is trust land. Over 600 miles of road in the area are maintained by county and township authorities. Only 22 miles are maintained by the Bureau of Indian Affairs. The state-chartered municipalities of Wagner, Lake Andes, Dante, Pickstown, Ravinia, and Marty all lie within the former boundaries. Non-Indians comprise over two-thirds of the population in the area.
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> * * *
>
> [I]f we accept defendant's arguments, over 6000 citizens of Charles Mix County would presently find they have become residents of an Indian reservation. This region has not been considered a reservation by the general populace.

Greger, 1997 SD 14, ¶¶ 29, 30, 559 N.W.2d at 867. Dante, Lake Andes and Ravinia are on former allotments. Pickstown and Wagner are partly situated on former allotments. The Charles Mix County seat (the

courthouse and law enforcement center) are located on former allotment land.

[¶ 34.] Our Court has repeatedly held that South Dakota has jurisdiction over both ceded unallotted land and allotted parcels no longer titled in Indian ownership. In *Wood v. Jameson,* 81 S.D. 12, 130 N.W.2d 95, 99 (1964), we discerned a congressional purpose "to disestablish the reservation and restore to the public domain the lands therein with the exception of allotments in severalty." Thus we concluded that an offense at Lake Andes was not committed within Indian country. In *State v. Williamson,* 87 S.D. 512, 211 N.W.2d 182, 184 (1973), we held that "the Act of 1894 disestablished that portion of the Yankton Reservation which was ceded and sold to the United States," including the cities of Lake Andes and Wagner. *Cf. State v. Winckler,* 260 N.W.2d 356, 360 (S.D.1977) (Yankton Sioux Tribe Pork Plant at Wagner is trust land, thus, Indian country).

[¶ 35.] A conclusion that, despite present ownership, all originally allotted land is part of a reservation creates new federal, tribal and state jurisdictional lines within Charles Mix County and its communities that not only affect law enforcement matters, but innumerable other issues both momentous and mundane: taxation, licensing, voting, economic development, environmental protection. To turn back now, to hold that the reservation was not terminated when for so many years that has been legal conception of both Indians and non-Indians, would create a jurisdictional maze, and defeat "the

justifiable expectations of the people living in the area." *Hagen,* 510 U.S. at 421, 114 S.Ct. at 970.

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[¶ 36.] Paralleling the Act of 1894 under consideration here is the 1891 Act terminating the Lake Traverse Indian Reservation as decided in *DeCoteau. Yankton Sioux Tribe,* 522 U.S. at 344-45, 118 S.Ct. at 798. It is difficult to find any jural distinction between the two reservation sales. Even in 1892, the negotiators for the Yankton agreement repeatedly referred back to the Sisseton-Whapeton agreement, expressing their intent to effect the same result. In the end, pursuant to the General Allotment Act, both reservations were, in the same time frame, parceled to individual Indians, and all unallotted lands were sold to the United States. Both Acts used the same cession language: "cede, sell, relinquish and convey. . . ." The intent behind this language is unmistakably the same.

[¶ 37.] Like the 1891 Act, "[t]he 1894 Act contains the most certain statutory language, evincing Congress' intent to diminish the Yankton Sioux Reservation by providing for total cession and fixed compensation." *Yankton Sioux Tribe,* 522 U.S. at 357, 118 S.Ct. at 805; *see DeCoteau,* 420 U.S. at 445-46, 95 S.Ct. at 1093-94. In each instance, *all* unallotted lands were sold. With both treaties, the heart of the preamble language recited intent "to dispose of a portion of the land set aside and reserved" to them.

On both reservations, the opened lands were subject to the homestead and townsite laws of the United States. In both cases, the United States retained an agency and schools. Most significantly, no land in common was retained, no boundaries were redefined, and the parcels allotted to Indians were in both instances spread randomly across the former reservations. *Yankton Sioux Tribe,* 522 U.S. at 334-40, 118 S.Ct. at 793-96; *DeCoteau,* 420 U.S. at 428, 95 S.Ct. at 1085. In both Acts, it was provided that "excepting the sixteenth and thirty-sixth sections . . . shall be reserved for common school purposes, and be subject to the laws of" the State. The proclamations opening the reservations each referred to a "schedule of lands within the . . . reservation. . . ." Upon opening the land for settlement, in both instances South Dakota assumed unchallenged jurisdiction in all areas except on trust lands. *Yankton Sioux Tribe,* 522 U.S. at 357, 118 S.Ct. at 804; *DeCoteau,* 420 U.S. at 442, 95 S.Ct. at 1092. The *DeCoteau* Court perceived these circumstances to signal congressional intent to terminate the reservation and restore the land to the public domain. We believe the same intent is shown in the Yankton Reservation sale.

Conclusion

[¶ 38.] The place in Pickstown where Bruguier committed his crime lies on land within the original 1858 boundaries of the Yankton Sioux Reservation. This area was initially allotted to a member of the Yankton Sioux Indian Tribe, but was later sold in fee

to a non-Indian. Pickstown was created in 1946 as a federal reserve for the U.S. Army Corps of Engineers. Congress later relinquished ownership of this townsite to Pickstown's municipal corporation. It appears that Congress did not consider this area Indian country or an existing Indian reservation. Nonetheless, to comply with Supreme Court jurisprudence in deciding if this area is Indian country, we further considered the matter under the traditional principles the Court instituted.

[¶ 39.] Our analysis requires us to interpret a Nineteenth Century treaty, negotiated, enacted and enforced under outmoded values and discarded beliefs. In *Greger*, we refrained from interpreting the 1894 Act any broader than necessary. The Supreme Court in *Yankton Sioux Tribe* likewise decided only that the ceded portion of the reservation was diminished. Today we proceed further to decide the jurisdictional status of former allotments.

[¶ 40.] We conclude that Pickstown is not Indian country under 18 USC § 1151. It is not situated within the boundaries of a reservation because the Yankton Sioux Reservation was effectively terminated by the 1894 Act. Nor is it trust land, a dependent Indian community, or property held by the Tribe. Consequently, the State properly exercised jurisdiction over Bruguier and the circuit court correctly denied his habeas corpus petition.

[¶ 41.] Affirmed.

[¶ 42.] MILLER, Chief Justice, and SABERS, AMUNDSON, and GILBERTSON, Justices, concur.

188 F.3d 1010

United States Court of Appeals,
Eighth Circuit.
YANKTON SIOUX TRIBE, and its
individual members, Appellee,
United States of America, on its own behalf and
for the benefit of the Yankton Sioux Tribe,
Intervenor Plaintiff-Appellee,
v.
Matt GAFFEY, States Attorney of Charles Mix
County; Herman Peters, Member of the Charles Mix,
South Dakota, County Commission; Bruce Bakken,
Member of the Charles Mix, South Dakota, County
Commission; Jack Soulek, Member of the Charles
Mix, South Dakota, County Commission, Appellants,
William Janklow, Governor of South Dakota;
Mark W. Barnett, Attorney General of South Dakota,
Defendants.
Gary Beeson, Landowner; City of Dante;
City of Geddes; City of Lake Andes; City of
Pickstown; City of Platte; City of Ravinia; City of
Wagner; Harvey P. Weisser, doing business as Weisser
Oil Co., Inc ., Individually, Amici on behalf of
Appellant,
Vine Deloria, Jr.; Philip S. Deloria; Philip Lane, Sr.;
Philip Lane, Jr.; James Weddell, descendants of
Francois Deloria, Signatory to the Treaty of 1858,
and descendants and relatives of Philip J. Deloria,
Amici on Behalf of Appellee.
Yankton Sioux Tribe, and its individual members,
Appellee,
United States of America, on its own behalf and
for the benefit of the Yankton Sioux Tribe,
Intervenor Plaintiff-Appellee,

Matt Gaffey, States Attorney of Charles Mix County; Herman Peters, Member of the Charles Mix, South Dakota, County Commission; Bruce Bakken, Member of the Charles Mix, South Dakota, County Commission; Jack Soulek, Member of the Charles Mix, South Dakota, County Commission, Defendants,
William Janklow, Governor of South Dakota; Mark W. Barnett, Attorney General of South Dakota, Appellants.
Gary Beeson, Landowner; City of Dante; City of Geddes; City of Lake Andes; City of Pickstown; City of Platte; City of Ravinia; City of Wagner; Harvey P. Weisser, doing business as Weisser Oil Co., Inc ., Individually, Amici on behalf of Appellant,
Vine Deloria, Jr.; Philip S. Deloria; Philip Lane, Sr.; Philip Lane, Jr.; James Weddell, descendants of Francois Deloria, Signatory to the Treaty of 1858, and descendants and relatives of Philip J. Deloria, Amici on Behalf of Appellee.
Yankton Sioux Tribe, and its individual members; Darrell E. Drapeau, individually, a member of the Yankton Sioux Tribe,
Appellees,

v.

Southern Missouri Waste Management District, a non-profit Corporation,
Defendant,

v.

State of South Dakota,
Third Party Defendant-Appellant.
Gary Beeson, Landowner; City of Dante; City of Geddes; City of Lake Andes; City of Pickstown; City of Platte; City of Ravinia; City of Wagner; Harvey P. Weisser, doing business as Weisser Oil Co., Inc ., Individually, Amici on behalf of Appellant,
Vine Deloria, Jr.; Philip S. Deloria; Philip Lane, Sr.;

Philip Lane, Jr.; James Weddell, descendants of Francois Deloria, Signatory to the Treaty of 1858, and descendants and relatives of Philip J. Deloria, Amici on Behalf of Appellee.
Yankton Sioux Tribe, and its individual members; Darrell E. Drapeau, individually, a member of the Yankton Sioux Tribe,
Appellees,
v.
Southern Missouri Waste Management District, a non-profit Corporation,
Appellant,
v.
State of South Dakota, Third Party Defendant.
Gary Beeson, Landowner; City of Dante; City of Geddes; City of Lake Andes; City of Pickstown; City of Platte; City of Ravinia; City of Wagner; Harvey P. Weisser, doing business as Weisser Oil Co., Inc ., Individually, Amici on behalf of Appellant,
Vine Deloria, Jr.; Philip S. Deloria; Philip Lane, Sr.; Philip Lane, Jr.; James Weddell, descendants of Francois Deloria, Signatory to the Treaty of 1858, and descendants and relatives of Philip J. Deloria, Amici on Behalf of Appellee.
No. 98-3893, 98-3894, 98-3896, 98-3900.

Submitted June 17, 1999.
Filed Aug. 31, 1999.
Rehearing and Rehearing En Banc Denied Dec. 8, 1999.*

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* Judge Beam and Judge Loken would grant the petitions and Chief Judge Wollman would grant the petitions for rehearing en banc filed by the State of South Dakota, the Southern Waste Management District, and Charles Mix County.

Mart Barnett, Atty. Gen. of South Dakota, Pierre, SD, Argued (John P. Guhin, Asst. Atty. Gen., Pierre, SD, Tom T. Tobin, Winner, SD, Scott J. Podhradsky, Lake Andes, SD, on the brief), for Appellant.

Rita Allen, Asst. U.S. Atty., Sioux Falls, SD, Argued, for Appellee U.S.

James G. Abourezk, Sioux Falls, SD, Argued, for Yankton Sioux Tribe.

Before RICHARD S. ARNOLD, MAGILL, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

Before the court are several appeals from judgments concerning lands once recognized to be part of the Yankton Sioux Reservation. After the Supreme Court decided in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) (*Yankton*), that the reservation had been diminished at the end of the nineteenth century when the Yankton Sioux Tribe (Tribe) ceded land to the United States, that case was remanded for further proceedings.[1] In the district court the case was then consolidated with an action brought by the Tribe to

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[1] *See Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 141 F.3d 798 (8th Cir. 1998). Earlier in the history of the case we upheld the district court's previous ruling that the reservation had been neither disestablished nor diminished. *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 890 F.Supp. 878 (D.S.D. 1995), *aff'd*, 99 F.3d 1439 (8th Cir. 1996), *rev'd*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998).

challenge state criminal jurisdiction over acts of tribal members on nonceded land within the original reservation boundaries. After an evidentiary hearing, the district court granted declaratory relief to the Tribe, its individual members, and its chairman Darrell Drapeau, and issued permanent injunctions enjoining state officials from exercising criminal jurisdiction over tribal members on "allotted or reserved lands." *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135, 1160 (D.S.D.1998). The district court concluded that the reservation has not been disestablished and still includes all land within the original exterior reservation boundaries that was not ceded to the United States. *See id.* at 1159. The State of South Dakota (State), the Southern Missouri Waste Management District (District), and the individual named state and county officials appeal.[2]

We affirm the conclusion that the reservation was never clearly disestablished, but we reverse the conclusion that the original exterior boundaries of the reservation continue to have effect and that all nonceded lands remain part of the reservation. We also vacate the injunctions issued in the district court and remand the cases for further proceedings consistent with this opinion.

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[2] The named defendants in the declaratory judgment action were Matt Gaffey, States Attorney of Charles Mix County and four members of the Charles Mix, South Dakota, County Commission (collectively "county officials"), as well as William Janklow, Governor of South Dakota and Mark W. Barnett, Attorney General of South Dakota (collectively "state officials")

I.

The original boundaries of the Yankton Sioux Reservation were defined in a treaty between the United States and the Yankton Sioux Tribe on April 19, 1858, 11 Stat. 743 (1858 Treaty), to include approximately 400,000 acres in what is now Charles Mix County, South Dakota.[3] The Supreme Court held in *Yankton* that the reservation was diminished by land ceded to the United States under an 1892 agreement, later ratified by Congress in 1894. Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, 314-19 (1894 Act). The specific question before the Court in *Yankton* was whether the Tribe continued to have jurisdiction over a portion of the ceded land on which the District planned to build a landfill. The Court focused its discussion on that issue, holding unanimously that the Yankton Sioux Reservation had been diminished by the 1894 Act, at least to the extent of the tracts

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[3] The reservation was later surveyed and found to comprise 430,405 acres. *See Letter from the Commissioner of Indian Affairs to the Secretary of the Interior* (Dec. 9, 1983), *reprinted in*, S. Exec. Doc. No. 27, 53d Cong., 2d Sess., 1, 5 (1894) (1894 Commissioner Letter). It is estimated that under the Dawes Act, 167,325 acres were allotted and patented, and that an additional 95,000 acres were allotted after passage of the 1891 Act, leaving 168,000 acres of unallotted lands to be ceded through the 1894 Act. *See id.* The figures from the 1894 Commissioner Letter have been used by the parties throughout this litigation. Nevertheless, we note that the Court of Claims found in 1980 that the Yankton Sioux had ceded 201,110 unallotted acres through the 1894 Act. *Yankton Sioux Tribe v. United States*, 224 Ct.Cl. 62, 623 F.2d 159, 184 (1980).

ceded to the United States, and that the State has primary jurisdiction over all ceded lands including the waste site. *See Yankton*, 118 S.Ct. at 805.

A.

The district court held an evidentiary hearing after *Yankton* was remanded and consolidated with the second case, and later ruled that the Yankton Sioux Reservation had not been disestablished and that it had only been diminished to the extent of the ceded lands. *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135 (D.S.D.1998). The court noted that nothing in the explicit language of the 1892 agreement supports disestablishment, but that several articles support the conclusion that a diminished reservation remains intact. *Id.* at 1149-56. It also referred to the reports of the council meetings with the Tribe, which do not discuss boundary changes or relinquishment of the reservation, but indicate that the 1892 agreement "memorialized only the consent of the Tribe to sell the surplus lands." *Id.* at 1145. The efforts to have the tribal members live close to white settlers were not intended to eliminate the reservation, but to help the Indians adapt to changed conditions. *Id.* at 1146-47. The Indians could have concluded from the representations made by the government negotiators that they would retain independent powers of self government over their lands. *Id.* at 1147. The district court held that the Yankton Sioux Reservation consists of all nonceded land "within the original exterior 1858 treaty boundaries,"

including those parcels now owned by non Indians, as well as Indian owned land and the land reserved from sale in the 1892 agreement for agency, school, and other tribal purposes. *Id.* at 1159. It concluded that primary criminal and civil jurisdiction over these lands belongs to the Tribe and the United States. *Id.* The court then issued declaratory judgments and enjoined state and county officials from exercising criminal law enforcement jurisdiction over tribal members alleged to have committed crimes on reservation land. *Id.* at 1159-60.

The State, the District, and the individual state and county officials appealed from these judgments in four separate appeals which have been consolidated by this court. A motion to expedite the appeals was also granted.[4] The four groups of appellants all

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[4] Several other motions have been filed The County has moved to have the briefs to the Supreme Court lodged with the clerk The Supreme Court briefs were made part of the record in the district court and are available online. The motion is denied since the briefs are already available The Tribe and the United States have moved to strike portions of the District's brief and to strike the amicus briefs of Gary Beeson and the Cities of Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia, and Wagner (collectively Cities) In addition, the Tribe has moved to strike the amicus brief of Harvey P Weisser All the motions to strike allege that the challenged briefs refer to documents which are not part of the record on appeal and thus violate Fed. R App P 10(a) With the exception of the affidavits of Jonelle J Drapeau and Ed Zylstra, submitted as addenda to the amicus brief of the Cities, the challenged references do not deal for the first time with key factual material about which the opposing parties were unaware. The motions to strike portions of the District's brief

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present complementary arguments; they will be referred to collectively as "the State" when their arguments do not differ. The United States offers numerous arguments supportive of the Tribe's position; both appellees will be referred to collectively as "the Tribe" except where their arguments diverge. Each side basically argues that it is entitled to win on all issues left open by the Supreme Court in *Yankton*. The contentions between them primarily involve questions of law which we review de novo, although any factual findings are reviewed for clear error. *See* Fed.R.Civ.P. 52(a).

The State asserts that the 1894 Act disestablished the Yankton Sioux Reservation and that the only remaining indian country within the original boundaries are "Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. § 1151(c). It claims that the Supreme Court held in *Yankton* that the reservation boundaries did not remain intact and that it also implied that *DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975) (finding the Lake Traverse Reservation completely disestablished), controls the outcome here. The State interprets the text of the 1894 Act and its legislative history as illustrating the parties' intent to eliminate the reservation, and it

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and portions of the Weisser and Beeson briefs are denied The motions to strike the Cities' brief are granted only to the extent that they seek to strike the Drapeau and Zylstra affidavits; these affidavits are stricken and have not been considered

finds further support for this position in the subsequent treatment of the area. It argues that immediately following the 1894 Act the Tribe itself did not hold any land in common, and the State's exercise of jurisdiction over the area has led landowners to develop reasonable expectations that their lands are not Indian country.

The Tribe argues that the district court correctly ruled that all the nonceded land within the original exterior reservation boundaries constitutes the present Yankton Sioux Reservation.[5] The Supreme Court finding of diminishment in *Yankton* does not mean that the reservation boundaries did not continue as before, and it cites in support the Tenth Circuit's decision in *Ute Indian Tribe v. Utah,* 114 F.3d 1513 (10th Cir.1997), *cert. denied,* 522 U.S. 1107, 118 S.Ct. 1034, 140 L.Ed.2d 101 (1998). The Tribe argues that *DeCoteau* does not control because each agreement and treaty with an Indian tribe is unique and must be examined in light of the circumstances surrounding its passage. *See Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, ___, 119 S.Ct. 1187, 1203, 143 L.Ed.2d 270 (1999). It contends that the required clear statement of congressional intent to disestablish the reservation cannot be found in the

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[5] The district court observed that the Tribe's Constitution as amended in 1990 claimed jurisdiction "extending to the original exterior 1858 boundaries." *Yankton Sioux Tribe v. Gaffey,* 14 F.Supp.2d at 1157. *But see Yankton,* 118 S.Ct. at 804-05 (quoting the Constitution drafted in 1932 and amended in 1962).

text of the 1894 Act, the legislative history, or the historical circumstances surrounding its passage. It argues instead that these documents show that Congress and the parties who negotiated the agreement intended all the nonceded land to retain its reservation status.

B.

The *Yankton* Court explicitly limited the scope of its holding to the status of the ceded lands. Those "surplus" lands were intended by the 1892 agreement to be sold to white settlers, but a small amount of unallotted land was reserved from sale for use by the federal government. This land was returned to the Tribe in 1929 and remains under its control. *See* Act of February 13, 1929, ch. 183, 45 Stat. 1167. The Supreme Court refrained from going beyond what was necessary for it to decide in *Yankton,* and it did not determine issues of current jurisdiction over the nonceded lands which were reserved from sale or were originally allotted to individual tribal members. *See Yankton,* 118 S.Ct. at 805.

Allotment is a term of art in Indian law. It refers to the distribution to individual Indians of property rights to specific parcels of reservation. *See Affiliated Ute Citizens v. United States,* 406 U.S. 128, 142, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972). The rights of use and occupancy to these lands were initially held in common by the Tribe, and the federal allotment policy sought to advance assimilation of the Indians by

promoting its prevailing concept of individual land ownership. The practice of allotting reservation land began with the 1887 passage of the General Allotment Act (Dawes Act), ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. § 331). Under the Dawes Act individual tribal members received patents for allotments of reservation land in parcels of up to 160 acres, to be held in trust by the federal government for twenty five years. At the end of the trust period the United States would convey the allotment in fee to the individual allottee, who would then be subject to the civil and criminal laws of the State or Territory in which he resided. *Id.* at 389-90. At the time there was increasing pressure for western land for white settlers, and the Dawes Act provided that the Secretary of the Interior could negotiate with an Indian tribe to purchase all unallotted lands. *Id.* The act was thus a two pronged effort to open up lands for white settlement and to encourage assimilation of the Indians. It was considered a critical element in assimilation because the Indian concept of tribal control over land was fundamentally different from the European American concept of individual land ownership. *See* Felix Cohen, *Handbook of Federal Indian Law* 131-32 (1982 ed.).

Approximately three-fifths of the Yankton Sioux Reservation was allotted under the Dawes Act and an act of February 28, 1891, ch. 383, 26 Stat. 794 (amending and extending the Dawes Act). Although the trust period was initially set at twenty five years, it was terminated early for some allotments and

extended for others. At least eighty five percent of the land allotted on the Yankton Sioux Reservation eventually passed out of trust status; most of this land was sold in fee to non Indians. The allotment policy was later repudiated by the passage of the Indian Reorganization Act in 1934, which prohibited further allotment of reservation land and indefinitely extended the trust period for the remaining trust lands. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-77). The record is far from crystal clear about the specific lands remaining in trust on the Yankton Sioux Reservation, but it appears such land is interspersed in a checkerboard pattern with ceded lands and lands which have passed out of trust status and are now owned in fee.

The land ceded to the United States under the 1894 Act was subsequently sold to homesteaders, but the lands allotted to individual Indians continued to be held by the United States in trust for them. Many of these parcels soon lost their trust status. The Burke Act, ch. 2348, 34 Stat. 182 (1906) (codified at 25 U.S.C. § 349), permitted the government to take certain allotted lands out of trust status before the twenty five year time period expired and to grant the individual Indian allottees unrestricted fee title to the land. In addition, the trust period on lands which had been allotted within a few years of the passage of the Dawes Act in 1887 began to expire in the first part of the twentieth century. At that time it was understood that when an allotment passed out of trust status and

the allottee received the land in fee, he also became subject to the civil and criminal laws of the State, *see* Dawes Act, 24 Stat. at 389-90, and could then sell his land to non Indians if he chose.

As federal policy began shifting away from allotment, the federal government acted to protect the trust status of the remaining allotments which had not yet lost that status. In 1916, an executive order was issued extending the trust period on all but approximately 150 of the parcels still held in trust on the Yankton Sioux Reservation. Exec. Order No. 2363, Apr. 20, 1916. The trust period for these allotments was extended again in 1926 and 1929, Exec. Order No. 4406, Mar. 30, 1926; Exec. Order No. 5173, Aug. 9, 1929, and then indefinitely in 1934 by the Indian Reorganization Act, § 2, ch. 576, 48 Stat. 984, 984 (1934) (codified at 25 U.S.C. § 462). As a result of this history, the majority of residents in many areas of the original Yankton Sioux Reservation are non Indian.[6] *See* U.S. Dept. of Commerce, Census Bureau, 1990

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[6] According to the 1990 Census, the overall area was approximately two-thirds non Indian, and although the tribal presence in the area has been increasing since the Fort Randall Casino was built, *see Yankton*, 118 S.Ct. at 804, it appears that non Indians own the bulk of the land within the original reservation boundaries. Municipalities such as Lake Andes and Wagner, for example, have non Indian majorities even though they are partially located on lands originally allotted to individual Yankton tribal members. The Tribe has apparently recently purchased additional land in the area and has petitioned the United States to take it into trust.

Census of Population, General Population Characteristics, South Dakota 29 tbl. 13 (1990 Census).

These appeals concern the undetermined current status of the 262,000 acres originally allotted to tribal members, some of which remain in trust, but the bulk of which have lost their trust status and are owned in fee by non Indians. The Supreme Court explained in *Yankton* that "[t]he conflicting understandings about the status of the reservation, together with the fact that the Tribe continues to own land in common, caution us . . . to limit our holding to the narrow question presented: whether unallotted, ceded lands were severed from the reservation." *Id.* It answered that question by holding that the ceded lands were severed and the reservation diminished to that extent. *Id.* We are called on now to address questions intentionally left open in *Yankton* – whether the Yankton Sioux Reservation was disestablished, and if not, whether the reservation has been diminished beyond the nonceded lands.

C.

Although the terms "diminished" and "disestablished" have at times been used interchangeably, disestablishment generally refers to the relatively rare elimination of a reservation while diminishment commonly refers to the reduction in size of a reservation. *Compare DeCoteau*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300; *with Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977);

see also Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., 99 F.3d 1439, 1443 n. 4 (8th Cir.1996). A finding of diminishment generally suggests that a discrete, easily identifiable parcel of land has been removed from reservation status. *See, e.g., Rosebud Sioux Tribe*, 430 U.S. at 615, 97 S.Ct. 1361. The 168,000 acres by which the reservation was found diminished in *Yankton* are not contiguous, however, and no single boundary line can encompass these lands.

The question here is one of jurisdiction, that is to what extent the Tribe retains jurisdiction over any nonceded land within the original reservation boundaries. Congress clarified tribal jurisdiction by statute in 1948. For the Tribe to have jurisdiction over any land under the current statute it must qualify as Indian country pursuant to 18 U.S.C. § 1151. The statute defines Indian country to include all reservation land (§ 1151(a)), dependent Indian communities (§ 1151(b)), and allotments "the Indian titles to which have not been extinguished" (§ 1151(c)). If a reservation exists, the Tribe maintains jurisdiction over all land within its limits, § 1151(a),[7] but if there is no

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[7] It is undisputed that there are broad areas over which the Tribe cannot have exclusive jurisdiction regardless of territorial jurisdiction. For example, tribes do not have criminal jurisdiction over non Indians, *see Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), or authority to regulate activities of nonmembers which do not affect tribal welfare and self-government unless the nonmembers have entered into consensual relations with the Tribe, *see*

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reservation, the State has primary jurisdiction over all land except allotments which continue to be held in trust, § 1151(c); *see also, Alaska v. Native Village of Venetie*, 522 U.S. 520, 118 S.Ct. 948, 953, 140 L.Ed.2d 30 (1998).

The parties agree that the Tribe has jurisdiction over allotted lands still held in trust by the federal government. The State, the District, and the individual state and county officials assert, however, that this jurisdiction falls under § 1151(c) and that no other lands within the original 1858 boundaries have retained their status as Indian country under § 1151(a) because the reservation has been completely disestablished. The Tribe and the United States argue that the district court correctly ruled that the original exterior reservation boundaries retain effect and that all nonceded land within those boundaries constitutes the Yankton Sioux Reservation.

II.

A.

The heart of the matter involves whether Congress intended to disestablish the Yankton Sioux Reservation when on August 15, 1894 it finally ratified the 1892 agreement ceding certain tribal lands to the United States, *see* 28 Stat. at 314-20, or if not,

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Montana v. United States, 450 U.S. 544, 563-67, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981).

whether it intended to diminish the reservation beyond the ceded lands. The 1892 agreement was the product of protracted negotiations between twenty four tribal representatives and the members of the Yankton Indian Commission (the Commissioners) who were appointed to procure the sale of the unallotted lands. The negotiations took place through a series of councils held from October through December of 1892. Although the immediate objective of the negotiations was the purchase of the unallotted lands, the Commissioners viewed this purchase as a step in the larger process of encouraging complete assimilation.

Commissioner Cole outlined the Commission's mission to the tribal representatives at the first council meeting. He explained that "The Great White father has sent us here to treat with you. He wants to give you a chance to sell your surplus lands. . . . He does not want you to sell your homes that he has allotted to you. He wants you to keep your homes forever." Council of the Yankton Indians (Oct. 8, 1892), transcribed in S. Exec. Doc. 27, 53d Cong., 2d Sess., at 49. Later in the negotiations, Commissioner Cole also encouraged the Tribe to adapt to western influences. He argued that the Tribe had no choice but to sell the unallotted lands, declaring: "The tide of civilization is as resistless as the tide of the ocean, and you have no choice but to accept it and live according to its methods or be destroyed by it. To accept it requires the sale of these surplus lands and the opening of this reservation to white settlement."

Council of the Yankton Indians (Dec. 17, 1892), transcribed in S. Exec. Doc. No. 27, at 81.

The Tribe proved reluctant to accept the offer to purchase its surplus lands. The Commission's reports show its work was made difficult by the Indians' distrust of the federal government and by factional divisions within the Tribe. *See* Report of the Yankton Indian Commission (March 31, 1893), reprinted in S. Exec. Doc. No. 27, at 7-25 (hereinafter Report). Some tribal members favored the sale and focused their energies on obtaining the highest possible price for the land, while others expressed strong opposition to any sale of tribal lands. *See id.* at 8-11. Key issues in the negotiations included the price to be paid for the lands, the payment of money due to individual Indians who had served as scouts for the United States, the continued payment of annuities pursuant to the 1858 Treaty, and the exclusion of alcohol from the ceded area. *See id.* at 12-21. As the Commission reported: "Careful inquiry into the conditions and requirements of these Indians soon revealed to us the fact that the purchase of the surplus land was but a small part of our mission and of minor importance to both the Indians and the Government, the provisions connected therewith for the future welfare of the Indians being of greater importance to them and to the Government than the sale of their surplus lands." *Id.* at 17.

In December of 1892, the Commission finally reached an agreement with the Tribe whereby it agreed in Articles I and II to "cede, sell, relinquish,

and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation" for $600,000. 28 Stat. at 314-15. Article VIII provided that the portions of the ceded land currently occupied by the United States for "agency, schools, and other purposes" would be reserved from sale to settlers. 28 Stat. at 316. Article XVIII stated that the agreement did not abrogate the Tribe's rights under the 1858 treaty, 28 Stat. at 318, but this language pertained only to the right to receive annuities, not to the reservation boundaries. *See Yankton,* 118 S.Ct. at 799. Several other sections of the agreement are relevant to these appeals, but many are not.[8]

By 1893 the Commissioners had collected the signatures required to show endorsement of the agreement by a majority of the adult male members

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[8] Articles VII, IX-XVI, and XIX-XX have little bearing on the issues here. Article VII provided for gifts of gold pieces to tribal members. 28 Stat. at 316. Article IX allowed uncultivated allotted land to be leased. *Id.* Article X allowed religious societies to purchase ceded land on which they were operating. *Id.* at 316-17. Article XII provided that the money paid under the agreement was not subject to claims by creditors. *Id.* at 317. Article XIII fixed the status of mixed bloods. *Id.* Article XIV required the government to complete the allotment process as soon as possible. *Id.* Article XV settled the claims of the Yankton scouts who had not been paid for their services. *Id.* Article XVI settled the Tribe's claim to the Pipestone Reservation. *Id.* at 317-18. Article XIX required a copy of the agreement to be placed in the Yankton "Agreement Book." *Id.* Article XX bound the parties upon ratification by Congress. *Id.*

of the Tribe. Congressional action to ratify the agreement was delayed, however, by the need to investigate allegations of fraud in the procurement of signatures. Congress finally ratified the agreement on August 15, 1894, along with two other similar surplus land sale agreements. 28 Stat. at 314-20. The 1894 Act incorporated the entire 1892 agreement, appropriated necessary funds, prescribed a punishment for violating the liquor prohibition, and reserved some sections for common school purposes. *Id.*

B.

Our starting point in analyzing the 1894 Act is the Supreme Court's *Yankton* decision, which each side not surprisingly interprets in its own favor. The State asserts that *Yankton* provides an easy answer to the questions before the court because it shows that the reservation status of all land within the original boundaries has been lost. Because the Court relied on *DeCoteau,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300, for the proposition that certain language in the 1894 Act was precisely suited to terminating reservation status, and because *DeCoteau* had found the Lake Traverse Reservation completely disestablished, it necessarily follows that the 1894 Act similarly completely disestablished the Yankton Sioux Reservation. In contrast, the Tribe distinguishes *DeCoteau* and claims that *Yankton* 's holding of diminishment does not mean the reservation has been disestablished or its exterior boundaries changed.

Justice O'Connor, writing for the unanimous *Yankton* Court, articulated its precise holding as follows:

> In sum, we hold that Congress diminished the Yankton Sioux Reservation in the 1894 Act, that the unallotted tracts [which were ceded to the United States through that Act] no longer constitute Indian country, and thus that the State has primary jurisdiction over the waste site and other lands ceded under the Act.

Yankton, 118 S.Ct. at 805. The Court explicitly declined to decide whether or not the 1894 Act altered the status of the nonceded lands. As Justice O'Connor explained, "[w]e need not determine whether Congress disestablished the reservation altogether in order to resolve this case, and accordingly decline to do so." *Id.* Whether or not other land within the original reservation boundaries retained its reservation status thus remained an open question.

Although the Court used *DeCoteau* in reaching its conclusion of diminishment, the *Yankton* holding was explicitly more limited than that in the earlier case. In *DeCoteau*, the Supreme Court analyzed the circumstances surrounding the ratification and the text of an agreement ceding certain lands on the Lake Traverse Reservation to the United States and held that the reservation there had been completely disestablished. *DeCoteau*, 420 U.S. at 427, 95 S.Ct. 1082. The background of the Lake Traverse agreement was very different from that of the 1894 Act, however,

because the tribal members there had expressed their clear desire to terminate their reservation. *See DeCoteau,* 420 U.S. at 432, 95 S.Ct. 1082. In exchange they negotiated allotments for each individual, including married women. *See Act of March 3, 1891,* ch. 543, 26 Stat. 989, 1037-38. The circumstances surrounding the negotiation of the 1892 agreement with the Yankton Sioux and the difficulty in obtaining tribal votes to ratify it are significantly different, and there was no expression by the Indians of an intent to eliminate their reservation. Even more important, the content and wording of the agreements are very different, aside from the particular cession language the Supreme Court compared in *Yankton. Compare* 26 Stat. 1036-38, *with* 28 Stat. 314-18.

It is well established that similar treaty language does not necessarily have the same effect when dealing with separate agreements. Justice O'Connor writing for the Court in *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, ___, 119 S.Ct. 1187, 1203, 143 L.Ed.2d 270 (1999), warned against reaching this conclusion.

> The . . . argument that similar language in two Treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of basic principles of treaty construction. . . . Th[e] review of history and the negotiations of the agreement is central to the interpretation of treaties.

Context has been found to play a similarly important role in interpreting the language of the surplus land acts.[9] *See Solem v. Bartlett,* 465 U.S. 463, 469, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). The Commissioners negotiating on behalf of the United States told the Yankton tribal representatives that "[The Great White Father] wants you to keep your homes forever. He only wants you to sell your surplus lands for which you have no use." Council of the Yankton Indians (Oct. 8, 1892), transcribed in S. Exec. Doc. 27, 53d Cong., 2d Sess., at 49. In light of the significant contextual differences, we cannot assume that the Court's citation to *DeCoteau* means that that case controls the issues raised here.

The *Yankton* Court did make a number of explicit references to the status of the reservation boundaries. The Court found the 1894 Act distinguishable from those acts which it "has interpreted as maintaining reservation boundaries." *Yankton,* 118 S.Ct. at 799. The question before it was described as whether the 1894 Act "diminished the boundaries" of

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[9] Although in 1871, Congress terminated treaty making with Indian tribes, the United States continued to negotiate agreements with them in much the same manner as it had negotiated treaties. *See* Felix S. Cohen, *Handbook of Federal Indian Law* 127-28 (1982 ed.) The 1892 agreement itself was also sometimes referred to as a "treaty." *See, e.g.,* S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 48 (statement of Commissioner Cole to tribal negotiations), 1894 Commissioner Letter at 5 (letter from Commissioner of Indian Affairs referred to the Secretary of the Interior)

the reservation. *Id.* at 793. The Court distinguished situations in which states acquired primary jurisdiction over opened lands and "thereby diminished the reservation boundaries" from those in which the entire opened area remained Indian country even though non Indians were able to purchase land. *Id.* at 797-98 (citations omitted). In the Commission reports it found evidence that the 1894 Act involved alteration of "the reservation's character" and "a reconception of the reservation." *Id.* at 802. Some of the language was "reminiscent" of that used for the diminished Unitah reservation. *Id.* ("Congress would 'pull up the nails' holding down the outside boundary" of the reservation) (citation omitted). The Court went on to hold that the savings clause of Article XVIII "*pertains to the continuance of annuities, not the 1858 borders.*" *Id.* at 800 (emphasis added). These references indicate the Court's understanding that the 1858 reservation boundaries did not remain intact following passage of the 1894 Act.

The Tribe is able to identify only one reservation which apparently continues to have its original boundaries even though some of the land within the boundaries has lost its reservation status – the Unitah Valley Reservation. The peculiar procedural history of the litigation involving that reservation does not suggest that it is precedent for maintenance of the original exterior borders of the Yankton Sioux Reservation. Long after the Tenth Circuit held that the Unitah Valley Reservation had been neither disestablished nor diminished, *Ute Indian Tribe v.*

Utah, 773 F.2d 1087 (10th Cir.1985) (en banc), the Supreme Court decided in a different case that the reservation had been diminished, *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994). The Tenth Circuit then modified its *Ute* decision to the extent it was in direct conflict with *Hagen*, holding that the ceded lands did not retain reservation status, but it did not change its position regarding the status of the other lands within the original reservation boundaries. *Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1520 (10th Cir.1997). The Tenth Circuit indicated that the reason it went no further in its 1997 decision was because of concern for finality in light of years of reliance on its earlier holding. *See id.* at 1524, 1527.

Based on our interpretation of what the Court said in *Yankton*, the lack of controlling precedent to suggest the original reservation boundaries can be maintained despite the extent of the diminishment, and the record before the court which we discuss below, we conclude that the original exterior boundaries of the Yankton Sioux Reservation do not serve to separate Indian country from areas under primary State jurisdiction.

C.

Congressional intent is the touchstone for analyzing whether the 1894 Act altered the status of the nonceded lands. *See Rosebud Sioux Tribe*, 430 U.S. at 586, 97 S.Ct. 1361. After land is set aside for an Indian reservation, it retains that status until

Congress explicitly indicates otherwise. *See Solem*, 465 U.S. at 470, 104 S.Ct. 1161. Intent to diminish or disestablish a reservation must be "clear and plain." *United States v. Dion*, 476 U.S. 734, 738, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986). Such intent must be "expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett*, 412 U.S. 481, 505, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973). Whether Congress intended to disestablish the reservation completely, or whether it intended all or some of the nonceded land to retain its reservation status is complicated by the fact that modern distinctions between different categories of Indian country were not recognized by nineteenth century legislators who had a different understanding of the requirements for land to be classified as reservation land and/or Indian country.

As mentioned earlier, three different categories of land currently qualify as Indian country:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. This definition of Indian country was codified in 1948, and its key provisions have remained unchanged since that time. The State places great emphasis on the distinction this definition makes between land that is Indian country because it is part of a reservation, § 1151(a), and land which qualifies as Indian country under § 1151(c) because of its allotment status. An Indian allotment may be either a parcel held in trust by the federal government for the benefit of an Indian (a trust allotment) or a parcel owned by an Indian subject to a restriction on alienation in favor of the United States (a restricted allotment). *See United States v. Stands*, 105 F.3d 1565, 1571-72 (8th Cir.1997). Under § 1151(c) both types of allotments are Indian country regardless of whether they are on or off an Indian reservation. 18 U.S.C. § 1151(c); *see also Alaska v. Native Village of Venetie*, 522 U.S. 520, 118 S.Ct. 948, 953, 140 L.Ed.2d 30 (1998). In contrast, lands that are owned in fee without such restrictions on alienation do not qualify as Indian country under § 1151(c); but they may be classified as Indian country under § 1151(a) if they are within the boundaries of an Indian reservation. *See Stands*, 105 F.3d at 1572.

The parties all agree that lands originally allotted to individual tribal members that are still held in trust by the United States are Indian country within the meaning of § 1151(c), but they dispute whether the Yankton Sioux reservation still exists and whether any nonceded lands fit the current understanding of Indian country in § 1151(a). The State argues that

although Congress intended some lands to retain their status as Indian country because of their status as allotments, it did not intend to maintain any reservation. The Tribe, on the other hand, argues that the 1894 Act only altered the status of the ceded lands and that the reservation status of all other lands within the original 1858 boundaries was not changed.

Members of Congress in 1894 operated on a set of assumptions which are in tension with the modern definitions of Indian country, and the intentions of that Congress and of the 1892 negotiating parties are what we must look to here. At the turn of the century, Indian lands were defined to include "only those lands in which the Indians held some form of property interest: trust lands; individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians." *Solem*, 465 U.S. at 468, 104 S.Ct. 1161. Lands to which the Indians did not have any property rights were never considered Indian country. The notion of a reservation as a piece of land, all of which is Indian country regardless of who owns it, would have thus been quite foreign. Congress in the late nineteenth century was operating on the assumption that reservations would soon cease to exist, *see id.*, and on the belief that allotting lands, and purchasing those left unallotted, were steps in the process of eventually dismantling the reservation system. *See United States v. Southern Pacific Transp. Co.*, 543 F.2d 676, 695 (9th Cir.1976). The 1894 Congress would have felt little pressure to

specify how far a given act went toward diminishing a reservation and would have had no reason to distinguish between reservation land and other types of Indian country. *See id.*

With this background in mind, *see Yankton*, 118 S.Ct. at 798, we consider whether the 1894 Congress intended to eliminate the Yankton reservation entirely or whether it intended to maintain the reservation status of some or all of the nonceded land. We apply the standard rules of interpretation for surplus land act cases. Each act must be analyzed individually, its effect depending on the language used and the circumstances of its passage. *See Solem*, 465 U.S. at 469, 104 S.Ct. 1161. The statutory language provides the most probative evidence of congressional intent. *See Rosebud Sioux Tribe*, 430 U.S. at 586, 97 S.Ct. 1361. Also relevant are the legislative history of the act and its historical context, including events surrounding the statute's passage which shed light on the contemporaneous understanding of it. *See Hagen v. Utah*, 510 U.S. 399, 411, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994). Treaties with Indians are also interpreted to give effect to the terms as the Indians themselves would have understood them. *See Mille Lacs Band of Chippewa Indians*, 119 S.Ct. at 1200. To a lesser extent, the subsequent treatment of the area is also relevant. *See Yankton*, 118 S.Ct. at 798. Under certain circumstances the "justifiable expectations" of the parties are considered, *see Rosebud Sioux Tribe*, 430 U.S. at 605, 97 S.Ct. 1361, as well as changes in the demographics of the area, *see Hagen*, 510 U.S. at

411, 114 S.Ct. 958 All ambiguities are resolved in favor of the Indians, and neither diminishment nor disestablishment will be found lightly. *See Yankton*, 118 S.Ct. at 798; *Hagen*, 510 U.S. at 411, 114 S.Ct. 958.

The primary purpose of the 1892 agreement, which was ratified by the 1894 Act, was to cede the unallotted surplus lands on the Yankton Sioux Reservation to the United States. The specific language accomplishing this goal is found in Articles I and II of the agreement. Article I states that the Tribe agrees to "cede, sell, relinquish, and convey to the United States all their [sic] claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation." 28 Stat. at 314. Article II provides that the United States agrees to pay the Tribe $600,000 "in consideration for the lands ceded, sold, relinquished, and conveyed to the United States." *Id.* at 315. The text of these articles refers explicitly only to the ceded lands.

The State argues that the cession of these lands necessarily terminated the reservation status of all lands within the original 1858 boundaries. It contends that allotments were intended to be temporary in nature and cannot alone constitute a reservation. It believes the failure of the Tribe to retain ownership in common of land for itself means that the reservation was disestablished. The State asserts that uncertainty about whether the Tribe owned land in common in 1894 was the key point which kept the *Yankton* Court from finding the reservation disestablished. Now that it has produced evidence to resolve

that question in its favor and the district court has found that the Tribe did not reserve any lands in 1892 to be held in common, *see Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d at 1154, the reservation must be found disestablished. We cannot agree that the Supreme Court expected this point alone to be dispositive, however, for it said that among the factors causing it to limit its holding was "the fact that the Tribe *continues* to own land in common." *Yankton*, 118 S.Ct. at 805 (emphasis added), an apparent reference to the Tribe's current landholdings.

The State also relies heavily on what it views as the background understanding of the 1894 Congress to support its conclusion that cession of all land held in common by the Tribe necessarily terminated the reservation status of everything within the original 1858 boundaries. It cites the comment in *Yankton* that around the turn of the century "'[t]he notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar.'" *Id.* 118 S.Ct. at 798 (quoting *Solem*, 465 U.S. at 468, 104 S.Ct. 1161). It is important to keep in mind that it is not clear that the reference in *Solem* to "tribal ownership" meant ownership of land in common by the Tribe, as opposed to ownership by a tribal member.[10] In any event Indian tribes did not hold

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[10] A careful reading of the relevant passage in *Solem* suggests that the Court used the terms "reservation lands" and "Indian lands" interchangeably to refer to all lands in which Indians had a property interest when it was discussing the

(Continued on following page)

ownership rights to land, but rather rights to exclusive use and occupancy of land. *See Spalding v. Chandler*, 160 U.S. 394, 403, 16 S.Ct. 360, 40 L.Ed. 469 (1896). Although the background understanding of the 1894 Congress "informs our inquiry," *id.*, courts have not been willing to extrapolate from general legislative assumptions and expectations of the late nineteenth century to find in each surplus land act a specific congressional purpose to remove all lands not under Indian control from reservation status. *See Solem*, 465 U.S. at 468-69, 104 S.Ct. 1161. If Congress' general understanding that tribal ownership was a necessary component of reservation status controlled, all land which passed out of tribal ownership would necessarily be found to have lost its reservation status – a conclusion the Supreme Court has explicitly refused to adopt. *Id.*

More persuasive arguments regarding the interpretation of Articles I and II are drawn from evidence which places the Act in its full historical context and

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assumptions of Congress in the early nineteenth century *Solem* contrasted lands that "retained reservation status" from those that were "divested of all Indian interests," and the Court appeared to use both the words "reservation lands" and "Indian lands" to refer to lands that retained their reservation status. *Solem*, 465 U S at 468, 104 S Ct 1161 "Indian lands" included "[o]nly those lands in which the Indians held some form of property interest trust lands, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians " *Id.* Finally, the Court specifically pointed out that "only in 1948 did Congress uncouple reservation status from *Indian ownership* " *Id.* (emphasis added)

sheds light on the parties' contemporaneous understanding of the impact of the cession. The State argues that this evidence shows that the "'cession' and 'sum certain' language" in Articles I and II, *see Yankton*, 118 S.Ct. at 798 (citation omitted), was intended to terminate the reservation status of all lands within the original reservation boundaries. The Tribe argues that these same documents establish that the parties understood that these articles would only terminate the reservation status of the ceded lands.

The Commissioners who negotiated the agreement on behalf of the United States retained detailed records of the councils held to negotiate the sale of the unallotted lands and prepared an extensive report which was submitted to Congress along with the agreement. *See* S. Exec. Doc. No. 27, 53d Cong., 2d Sess. (1894). Two key points can be discerned from these records. First, the Commissioners indicated to the tribal representatives that their primary objective was the purchase of the *unallotted* lands. Second, the Commissioners emphasized to the tribal representatives that tribal members needed to move into the modern, post tribal era and that the sale of the unallotted lands would constitute one step toward that ultimate goal. *See id.*

The Commissioners repeatedly emphasized that they had one primary purpose. Commissioner Adams, for example, introduced the Commission's purpose, stating that "we . . . understand that you own, outside your allotments, a large quantity of land in common.

It is this land that you own in common that we were appointed by the Great Father to talk to you about." Council of the Yankton Indians (Oct. 8, 1892), transcribed in S. Exec. Doc. 27, 53d Cong., 2d Sess., at 48. They also indicated that the tribal leadership would retain some governing powers, suggesting for example, that: "It might be, after you sold your lands, you could have this reservation organized as a separate county. If this could be done – I do not say it can – you could govern your own people in your own way, so long as you obeyed the laws of the State." *Id.* The Yankton Sioux could have interpreted such comments to indicate that their powers of self government, which at that time were limited to lands in which Indians had a property interest, would not be further limited and that the cession of the unallotted lands would not alter the Tribe's control over the lands retained by the Indians. Although the Commissioners were careful not to make promises concerning the scope of tribal self government powers, the references to a continuing tribal government suggest the parties did not intend to disestablish the reservation.

The Commissioners' introductory remarks, however, also emphasized that the tribal members needed to adapt to the modern era and urged them to allow settlers on the then unallotted lands so that they could learn from the white man how to farm, conduct business, and be citizens. *Id.* In line with the assumption that the reservation system would soon be outmoded, Commissioner Cole admonished:

> In your old life the tribal condition was a necessity. It united you and protected you and made you strong. But you are now living under new conditions and you must drop your old forms which are not suited to these conditions and take up new forms suited to your new mode of life. The Government seeing this sent an allotting agent to you to help you divide you land and select your homes. . . .
>
> Now that you have your homes and that your allotted lands are more than you can make use of, you have sent word to Secretary Noble that you desire to sell your surplus lands and get money to help you to improve your farms and build good houses and buy stock. The Great Father and his Great Secretary . . . have sent us here to buy [the] surplus lands for homes for white men who will settle among you; who will live peaceably and neighborly with you; who will cultivate these surplus lands and make your allotted lands more valuable.

Id. at 50. At the time the cession agreement was negotiated, the allotment process was not even complete; many allotments remained to be finalized. *See* 1894 Commissioner Letter at 5. The concept of individual property ownership was new to the Indians, and although it was hoped allotment would stimulate individual effort to improve the land, there is little indication that this concept had taken root. *See* Report of the Yankton Indian Commission (Mar. 31, 1893), reprinted in S. Exec. Doc. No. 27, at 7, 14-16

(1893 Report). The Indians thus could easily have understood these statements to mean that the status of the lands that had been allotted to them would not be changed by the agreement, and that they would retain control over these lands as in the past.

The Commission's report to Congress highlights its hope that assimilation would be promoted by the allotment of reservation lands and the cession of those that remained unallotted; but the report also suggests the parties recognized a division between unallotted and ceded lands. The Commission indicated that "now that [the members of the tribe] have been allotted their lands in severalty and have sold their surplus land – the last property bond which assisted to hold them together in their tribal interest and estate – their tribal interests may be considered a thing of the past." Report of the Yankton Indian Commission (Mar. 31, 1893), reprinted in S. Exec. Doc. No. 27, at 7, 19 (hereinafter Report). The Supreme Court found this language supported its conclusion that the 1894 agreement divested the Tribe of jurisdiction over the ceded lands. *Yankton*, 118 S.Ct. at 803.

This same report also indicates, however, that the ceded and nonceded lands would be treated differently, at least for as long as the Indians retained property in common, suggesting that the divestiture of jurisdiction was not complete. In explaining to Congress why they had such difficulty negotiating a price for the land, the Commissioners explained.

> On the matter of price we encountered much difficulty. Two important factors in determining the value of these lands seem to have been wholly overlooked by both the Indians and their friends: First, That the Indians were not selling their whole reservation, but less than two-fifths of it, and that more than three-fifths of it would remain in their possession for such cultivation and improvement as Indians will give to it, and free from taxation for twenty five years; second, that the surplus lands are not in one body, but scattered over the reservation and mixed up with the allotted lands of the Indians. We think the value of these surplus lands per acre would be doubled if the whole reservation were being disposed of by the Indians, to be equally improved by white people and uniformly taxed.

1893 Report at 13. This report is evidence of the parties' understanding that only a portion of the reservation was being separated at that time, and also suggests that the negotiations were complicated by the Indians' differing conception of land use and property ownership.

The Commission's reports do not describe any reservation boundaries or mention any transfer of the Yanktons' tribal sovereignty. *See Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135, 1148 (D.S.D.1998). Instead, these reports show only that the Commissioners emphasized the need for the Indians eventually to become completely assimilated into the

"modern era" and encouraged them to sell their surplus lands to aid in this process. Although the sale of the surplus lands was characterized as a step required by changes of the modern era, it was not directly equated with the loss of control over other lands. In sum, the plain language of the text of Articles I and II only refers to the ceded lands, and the reports of the Commission do not indicate the "clear and plain" congressional intent required to show the reservation status of all nonceded lands was terminated by this Act. The evidence is thus insufficient to establish that the "cession and sum certain" language of Articles I and II was intended to disestablish the reservation.

There are other provisions of the agreement which may shed light on the intended impact on unallotted lands. The State directs our attention to Articles III-VI and XI, which established a complex system for the payment of the purchase price of $600,000. 28 Stat. 315-17. It points out that some aspects of the payment plan were linked to the twenty five year trust period and argues that this shows that such lands retained their Indian country status because the Indian title to the allotments had not yet been extinguished. The Tribe, on the other hand, argues that the provision allowing for the Act's creation of a fund to support schools, courts, and other tribal institutions evidences congressional intent to preserve tribal self government within the 1858 boundaries and to maintain reservation status for the allotted lands.

According to the agreement for payment, $100,000 was to be divided among the members of the tribe per capita, and $500,000 was to be placed into an interest bearing account for the benefit of the Tribe. Article V provided that interest from that account could be used to set up a fund to meet basic needs of the tribal members, or it would be distributed on a per capita basis to tribal members. 28 Stat. at 315. After the trust period expired on the allotted lands, any monies remaining in the original account or in the fund were to be disposed of by the Secretary of the Interior for the benefit of the Tribe. Arts. IV, V, 28 Stat. at 315. Article IX provided that the allotted land of any tribal members who died without heirs within twenty five years was to be sold and the proceeds added to the fund provided for in Article V. 28 Stat. at 315-17.

The Tribe places great emphasis on Article V because it specifically provided that some of the interest due on payment funds might be set aside and used "for the care and maintenance of such orphans, and aged, infirm, or other helpless persons of the Yankton tribe of Sioux Indians . . . ; for schools and educational purpose for the said tribe; and for courts of justice and other local institutions for the benefit of said tribe." 28 Stat. at 315. Institutions that might have qualified for such monies included the Indian police force and the Court of Indian Offenses, both of which the district court found still operative at the time of ratification. *See Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d, at 1150. It is undisputed that this

optional fund was never actually created, but the fact that it was provided for in the statute has relevance on the question of intent. Article V clearly foresaw continued tribal activity in providing for the needs of the Yankton Sioux in terms of education, justice, and "other local institutions." Nevertheless, section 2 of the article also contemplated a future in which such a fund would not be needed when the Indians might receive "complete title to their allotted lands and . . . assume[ ] all duties and responsibilities of citizenship." 28 Stat. at 315.

The prohibitions on the sale of alcohol found in Article XVII provide further insight into the parties' intent. This article provides that "no intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians." 28 Stat. at 318. The Supreme Court found this provision indicated that the parties intended to diminish the reservation by the Act of 1894, reasoning that the language would have been superfluous if all lands were to retain their reservation status. *See Yankton*, 118 S.Ct. at 801. The language would also have been superfluous if the parties had intended to disestablish the Yankton Sioux Reservation. The Court found it significant that the provision "signal[ed] a jurisdictional distinction between reservation and ceded land. *Id.*" In this article the parties acknowledged the

continued existence of two distinct categories of land to which different laws might apply.

Article VIII, the "agency lands provision," provides strong evidence that a reservation was expected to remain in existence. This provision provides that "[s]uch part of the surplus lands hereby ceded and sold to the United States, as may now be occupied by the United States for agency, schools, and other purposes, shall be reserved from sale to settlers until they are no longer required for such purposes." 28 Stat. at 316. As the Supreme Court noted, this provision "counsels against finding the reservation terminated." *Yankton,* 118 S.Ct. at 801. The Court cited its prior interpretation of virtually identical language in *Solem* where it reasoned that it would be "'difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation.'" *Yankton,* 118 S.Ct. at 801 (citing *Solem,* 465 U.S. at 474, 104 S.Ct. 1161). Congress' expectation that the federal government would continue to have a significant presence in the area for the welfare of the Tribe indicates that some lands were expected to remain outside of primary state jurisdiction.

The State argues that the retention of this land is irrelevant to our analysis because the provision does not specify that such reserved land remained in reservation status, and the federal government's continuing obligations were based on the fact that Indian allottees held patents for their land in

trust. Nothing in Article VIII specifically ties the government's retention of these lands to the trust period, however, or indicates that its obligations were expected to end when the trust period expired. Instead, the Article says that the lands would be retained "until they are no longer required for such purposes." 28 Stat. at 316. And in 1929 the lands were returned to the tribe for common purposes. Act of February 13, 1929, ch. 183, 45 Stat. 1167 (explicitly providing that the lands could not be allotted).

Neither the text of the 1894 Act nor evidence of the parties' contemporaneous understandings clearly establish an intent to disestablish the Yankton Sioux Reservation. The reports indicate that the Commissioners' statements may have sent mixed messages to the Indians in that they sometimes talked about continuing tribal control over land and sometimes suggested that the property bonds of the Indians would be severed. The Indian understanding of land use and control differed from the European American notion of individual property ownership and the Commissioners' mixed messages could have led the Yankton Sioux to believe that their control over the lands retained in trust for individual members would remain unchanged. *See* Felix Cohen, *Handbook of Federal Indian Law* 131-32 (1982 ed.); *see also*, Michael L. Ferch, Indian Land Rights, 2 *Transnat'l L. & Contemp. Probs.* 301 (1992) (comparing the Indian view of property rights with the western view).

The Act could not foresee all that would happen in the future with population movement, state development, and changing Indian policy, but it contained provisions showing concern for future interests of the Indians in common, as well as provisions recognizing that conditions were sure to change as white settlers moved in to the opened reservation with the expectation of state support. In the Act, the federal government reserved land to provide for tribal needs in Article VIII, and the parties recognized a distinction between ceded and reservation lands in Article XVII. The Act did not leave all land within the original exterior reservation boundaries under tribal control, *see Yankton*, 118 S.Ct. at 805, or define new reservation boundaries, and nothing in its text or the circumstances surrounding its passage suggests that any party anticipated that the Tribe would exercise jurisdiction over non Indians who purchased land after it lost its trust status. Some articles of the Act reflect the parties' assumption that an allottee who received full title at the end of the trust period would become subject to the civil and criminal laws of the State or territory in which he resided. 24 Stat. at 389-90. Article V indicates that the fund which could be established to provide for helpless and infirm tribal members would no longer be needed "[w]hen the Yankton tribe of Sioux Indians shall have received from the United States a complete title to their allotted lands and shall have assumed all the duties and responsibilities of citizenship." 28 Stat. at 315. Congress also added the so-called "school sections clause" to the Act which parallels language in the

South Dakota enabling act, Act of Feb. 22, 1889, 25 Stat. 679, and provided that certain sections of the ceded land would be reserved for common schools, 28 Stat. at 319. This suggests that as more white settlers came on to the opened lands, increased state involvement on their behalf was expected, and the jurisdiction of the State was expected to increase over time.

In sum, the 1894 Act did not clearly disestablish the Yankton Sioux Reservation, but it intended to diminish the reservation by not only the ceded land, but also by the land which it foresaw would pass into the hands of the white settlers and homesteaders. The text of the 1894 Act, read in its full historical context, establishes that the intent was to cede certain lands to the United States and to open areas of the Yankton Sioux Reservation to white settlers, as well as to reserve land to be used to care for continued tribal interests. Until the Indian allottees would receive their lands in fee and the trust period over them would end, they could not convey land to non Indians. It was then foreseen that the trust period over the allotments would at some point come to an end, but we note that some of this allotted land apparently remains in trust to this very day.

D.

The treatment of the Yankton area in the years following the passage of the Act provides further evidence that the nonceded lands retained their

reservation status until they passed out of trust. Although evidence regarding the subsequent treatment of the area cannot control when there is strong textual and contemporaneous evidence regarding the status of the land in question, *Yankton*, 118 S.Ct. at 804, courts have consistently recognized that events occurring after the passage of a surplus land act may shed light on the contemporaneous understanding of the act, *see Solem*, 465 U.S. at 470-71, 104 S.Ct. 1161; *see also Hagen*, 510 U.S. at 411, 114 S.Ct. 958. Established jurisdictional patterns may also over time lead to the development of justifiable expectations which the Supreme Court has found worthy of consideration. *Rosebud Sioux Tribe*, 430 U.S. at 604-05, 97 S.Ct. 1361.

Congress took a definitive and considered step when it decided to return title to the Yankton Sioux Tribe for the lands that had been reserved for federal use in the 1894 Act. *See* Act of February 13, 1929, ch. 183, 45 Stat. 1167.[11] Congress not only returned the

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[11] References cited by the parties to administrative documents and maps, which either refer to the Yankton Sioux Reservation or lack any such reference, were found by the Supreme Court to have "limited interpretive value." *Yankton*, 118 S.Ct. at 803-04. The use of the term "Yankton Sioux Reservation" in such documents, without more, cannot be said to be a considered jurisdictional statement regarding the specific status of the remaining Indian lands. Moreover, problems associated with relying on the presence or absence of a cite on a map is illustrated by the failure of a prestigious map maker to include the states of North Dakota, South Dakota, Oklahoma and parts of Minnesota, Iowa, and Kansas in one world atlas. *See* Richard

(Continued on following page)

land to the Tribe, but also specifically provided that the land would not become available for allotment purposes. *Id.* Although "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," *Yankton*, 118 S.Ct. at 803, the return of these lands to tribal control suggests that the reserved lands were always intended to provide a property site for organized efforts to provide aid and education to tribal members so long as they were needed. This action indicates that at the close of the era, the United States government understood, as it continues to argue today, that the Yankton Sioux reservation was not completely disestablished in 1894.

Longstanding divisions of jurisdictional authority have also been entitled to considerable weight in similar boundary disputes. *See Rosebud Sioux Tribe*, 430 U.S. at 605 n. 28, 97 S.Ct. 1361. The State has presented uncontroverted evidence showing that the State has assumed primary jurisdiction over unallotted lands that have passed out of trust status. The Tribe has not established reason to doubt the veracity of the various letters and reports of several Superintendents of the Yankton Agency and Commissioners of Indian Affairs which indicate that the federal government only exercised jurisdiction over allotted lands held in trust and the agency reserve. In

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J. Margolis, "How the West Was Lost," *The New Leader*, p. 13 (Nov. 27, 1989) (discussing the omission of these states from Rand McNally's 1989 *Photographic World Atlas*)

addition, three former United States Attorneys for the District of South Dakota testified that during their tenures, which collectively cover most of the years between 1965 and 1991, the federal government continued to exercise jurisdiction only over those lands actually held in trust. The Tribe has presented evidence indicating that it maintained a tribal police force and an independent judicial system following the passage of the 1894 Act.[12] It has also presented evidence suggesting that the State did not always allocate sufficient resources to enforce its laws consistently within the original reservation boundaries. While this evidence may show problems of enforcement, it does not prove that the Tribe or the federal government exercised jurisdiction over the whole area. On the record before the court, the Tribe has not presented any new evidence to undermine the Supreme Court's statement that the Tribe has not asserted civil, regulatory, or criminal jurisdiction over lands other than those held in trust, *Yankton,* 118 S.Ct. at 804, and "the longstanding assumption of jurisdiction by the State over [a predominately non-Indian area creates] justifiable expectations which should not be upset by [a] strained . . . reading of the

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[12] The Tribe's position on this evidence is not contested A court of Indian offenses was in existence at the time of the treaty in 1894 Although it was abolished in 1909, its duties were taken over by the Superintendent until it was reinstated in 1943 The court was replaced in 1945 with the Yankton Sioux Tribal Court, but there is no evidence that this court ever exercised jurisdiction over lands owned by non-Indians

Acts of Congress," *Rosebud Sioux Tribe*, 430 U.S. at 604-05, 97 S.Ct. 1361.

III.

In 1858 Congress designated the Yankton Sioux Reservation as an area set aside for the exclusive use of the Yankton Sioux Tribe. The status of the lands which initially comprised this reservation were later altered when the federal government allotted lands previously held in common by the Tribe to individual Indians and then purchased the remaining unallotted lands to open them up for homesteading. In *Yankton*, the Supreme Court held that the cession of the unallotted lands in 1894 removed these lands from the reservation and indicated that the 1858 boundaries were not maintained. The text of the 1894 Act and evidence regarding the parties' contemporaneous understanding of it establish that the reservation was maintained, but do not define its precise boundaries. When viewed in its full historical context, however, it is clear that the parties did not intend for the tribe to retain control over allotted lands which passed out of trust status and into non Indian hands.

For these reasons, we hold that the Yankton Sioux Reservation has not been disestablished, but that it has been further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands. These lands are not part of the Yankton Sioux Reservation and are no longer Indian country within the meaning of 18

U.S.C. § 1151. We recognize that the original exterior treaty boundaries of the reservation have not been maintained. *See Yankton,* 118 S.Ct. at 799-800. We also assume that land now owned in fee by individual Indians is not under tribal jurisdiction unless it is found to be "within the limits of [the] Indian reservation." 18 U.S.C. § 1151(a). On the record before the court, however, we cannot define the precise limits of the reservation which remains.

The current amount of Indian trust land on the Yankton Sioux Reservation is unclear from the record. Since both sides have followed an all or nothing strategy (the State arguing disestablishment and the Tribe claiming maintenance of the 1858 boundaries), neither side spent much time developing the record on the specifics of this trust land. The South Dakota Supreme Court has said that the reservation was reduced by the 1894 Act "from a 410 square mile (430,495 acre) sanctuary down to what is presently scattered Indian holdings of approximately 40,000 acres." *State v. Greger,* 559 N.W.2d 854, 859 (S.D.1997). It also stated that in modern times both Indians and non Indians refer to the reservation "as a 'mile square'" *id.,* in reference "to the tribal headquarters area at Marty," *id.* at 859 n. 4. The Supreme Court later stated in *Yankton* that currently less than ten percent of the 1858 reservation lands remains "in Indian hands," 118 S.Ct. at 804, and that within the original exterior reservation boundaries, there are only 30,000 acres held in trust for individual Indians, and 6,000 acres of "tribal lands," *id.* at 796.

References in the briefs in these cases and in judicial opinions are not always clear about what is meant by trust land. The term is variously used to include 1) the land reserved to the federal government in the 1894 Act and later returned to the Yankton Tribe, 2) land allotted to individual Indians that remains held in trust, and 3) land taken into trust under the Indian Reorganization Act of 1934. Efforts at oral argument to get precise statements from the parties identifying what trust land remains were unsuccessful. At this time we hold only that the land reserved to the federal government in the 1894 Act and then returned to the Tribe continues to be a reservation under § 1151(a), and we leave it to the district court on remand to make any necessary findings relative to the status of Indian lands which are held in trust.

The judgments of the district court are affirmed in so far as the court concluded that the Yankton Sioux Reservation has not been clearly disestablished, but the judgments are reversed in so far as the court concluded that the 1858 exterior reservation boundaries remain intact and that all nonceded lands remain part of the reservation. The permanent injunctions entered by the district court are vacated, and the cases are remanded for further proceedings consistent with this opinion.

14 F.Supp.2d 1135

United States District Court,
D. South Dakota,
Southern Division.

YANKTON SIOUX TRIBE,
and its individual members, Plaintiffs,
United States of America, on its own behalf and
for the benefit of the Yankton Sioux Tribe,
Plaintiff-Intervenor,

v.

Matt GAFFEY, States Attorney of Charles Mix
County; Herman Peters, Bruce Bakken, and
Jack Soulek, Members of the Charles Mix, South
Dakota, County Commission; William Janklow,
Governor of South Dakota; and Mark Barnett,
Attorney General of South Dakota, Defendants,
The YANKTON SIOUX TRIBE, federally recognized
tribe of Indians, and its individual members, and
Darrell E. Drapeau, individually, a member of the
Yankton Sioux Tribe, Plaintiffs,

v.

SOUTHERN MISSOURI WASTE MANAGEMENT
DISTRICT, a non-profit corporation, Defendant.
SOUTHERN MISSOURI WASTE MANAGEMENT
DISTRICT, Third-Party Plaintiff,

v.

STATE OF SOUTH DAKOTA,
Third-Party Defendant.
Nos. Civ. 98-4042, Civ. 94-4217.

Aug. 14, 1998.

Robin L. Zephier, Rapid City, SD, Michael H. Scarmon, Stickney & Groe, Elk Point, SD, James G. Abourezk, Sioux Falls, SD, for Plaintiffs.

Tommy Drake Tobin, Winner, SD, Matthew F. Gaffey, Charles Mix County State's Atty., Lake Andes, SD, for Defendants.

Kenneth W. Cotton,Wipf & Cotton, Wagner, SD, for Interested Party Southern Missouri Waste Management Dist.

Kenneth W. Cotton, Wipf & Cotton, Wagner, SD, Mr. Timothy R. Whalen, Lake Andes, SD, for amicus.

Karen E. Schreier, U.S. Attorney, Rita D. Allen, Sioux Falls, SD, for Intervenor-Plaintiff U.S.

John P. Guhin, Pierre, SD, for Defendant/ Counterclaimant William Janklow.

Roxanne Giedd, John P. Guhin, Charles D. McGuigan, Pierre, SD, for State of S.D.

MEMORANDUM OPINION AND ORDER

PIERSOL, District Judge.

In *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), the United States Supreme Court held that the 1894 Act of Congress ratifying the 1892 Agreement with the Yankton Sioux Tribe for the sale of surplus tribal lands terminated the reservation status of those unallotted, ceded lands, resulting in the diminishment of the Yankton Sioux Reservation. The Supreme Court reached this decision with full acknowledgment that the "context of the [1894] Act is not so compelling that, standing alone, it would

indicate diminishment[.]" *Id.* 522 U.S. 329, 118 S.Ct. at 802. Rather, the Supreme Court relied upon the surrounding circumstances of the Act to conclude that Congress intended to diminish the reservation. The issue remaining for decision in these cases consolidated following the Supreme Court's remand is whether the 1894 Act of Congress disestablished the Yankton Sioux Reservation.

Although the parties to this litigation have at times used the terms "diminishment" and "disestablishment" interchangeably, the Court in this opinion uses each word to convey a particular meaning. As noted by the United States Court of Appeals for the Eighth Circuit in its vacated opinion, *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439, 1443 n. 4 (8th Cir.1996), the term "disestablishment" is "more precisely used to describe the relatively rare elimination of a reservation, *see e.g., DeCoteau v. District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), as opposed to reduction in the size of a reservation or 'diminishment.' *See, e.g., Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977)." The Supreme Court carefully stated in *Yankton Sioux Tribe,* 522 U.S. at ___, 118 S.Ct. at 805, that its holding was limited to the narrow question of whether the 1894 Act diminished – that is, reduced the size of – the Yankton Sioux Reservation. As in *Hagen v. Utah,* 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994), the Supreme Court declined to "determine whether Congress disestablished the [Yankton Sioux]

reservation altogether[.]" *Yankton Sioux Tribe*, 522 U.S. at ___, 118 S.Ct. at 805.

The Court now answers the question left open by the Supreme Court and, for the reasons explained thoroughly below, holds that the 1894 Act of Congress ratifying the cession and sale of surplus tribal lands did not disestablish the Yankton Sioux Reservation. The 1894 Act of Congress was not one of those "relatively rare" pieces of legislation that resulted in the elimination of a reservation. Rather, by ratifying the 1892 Agreement with the Yankton Sioux Tribe, Congress, in the words of the Supreme Court, modified or reconceptualized the Yankton Sioux Reservation. *See Yankton Sioux Tribe*, 522 U.S. at ___, ___, 118 S.Ct. at 798, 802. The Yankton Sioux Reservation, as diminished by the 1894 Act, encompasses all of the reservation lands that were allotted pursuant to the allotment acts, as well as the lands reserved from sale for agency, school, and other tribal purposes, within the original exterior reservation boundaries established by the 1858 Treaty with the Yankton Sioux Tribe.

Federal law defines "Indian country" as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151. The Yankton Sioux Reservation, as described above, is "Indian country" within the meaning of the federal statute.

I. Treaties and the End of Treaty-Making With the Yankton Sioux

The Yanktons belong to one of fourteen tribes in the federation of Sioux, and included 32,000 people claiming use rights to approximately 100 million acres of land upon the arrival of non-Indians during the 17th century. H. Hoover, *A Yankton Sioux Tribal Land History* at 2 (1995). (Pl. Ex. 31.) During the 18th century, when members of the federation spread by tribes and bands to occupy the historic Sioux Country, about two thousand Yanktons took up residence over the central portion between the Des Moines and Missouri Rivers, south of the present boundary that divides North and South Dakota. *Id.* By the early 19th century, the Yankton Sioux exclusively controlled over 13 million acres of land. *Id.* The United States government formally recognized the Yankton Sioux Tribe as a political entity when the first treaty was negotiated in 1815. H. Hoover, *A History of Yankton Tribal Governance* at 1 (1995) (Pl. Ex. 78.) The United States negotiated subsequent treaties with the Yankton Sioux in 1830, 1836, 1837, 1851, and 1858. *Id.*

"After some years of earnest effort on the part of the Interior Department to induce the Yanktons to cede a portion of their territory, finally, in the fall of 1857," a military captain, with the assistance of Charles T. Picotte, a Yankton half-blood, persuaded the Yanktons to send a delegation to Washington, D.C., to confer with the Government in the early part of the winter of 1857-58. Report Of The

Commissioner of Indian Affairs at 423-24 (Oct. 1, 1891). (Gov't. Ex. 18.) In the resulting April 19, 1858 Treaty, 11 Stat. 743, (Pl. Ex. 1), the Yankton Sioux Tribe ceded and relinquished to the United States:

> all the lands now owned, possessed, or claimed by them, where ever situated, except four hundred thousand acres thereof, situated and described as follows, to wit – Beginning at the mouth of the Naw-izi-wa-koo-pah or Chouteau River and extending up the Missouri River thirty miles; thence due north to a point; thence easterly to a point on the said Chouteau River; thence down said river to the place of beginning, so as to include the said quantity of four hundred thousand acres.

The Yankton Sioux were to have exclusive occupation of the reservation lands, along with unrestricted use of the red pipestone quarry in the State of Minnesota. A land survey later conducted revealed that 430,495 acres were included in the land mass described by the 1858 Treaty and reserved to the Yankton Sioux. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 5 (1894). (Pl. Ex. 5.) The land comprising the 1858 Yankton Sioux Reservation is located in the central to southeastern portion of Charles Mix County, South Dakota.

In the 1858 Treaty, the Yankton Sioux relinquished and abandoned all claims and complaints growing out of any and all treaties previously made by them or other Indian Tribes, except for their claim to annuity rights under the September 17, 1851

Treaty of Laramie. In return for the cession of land and release of claims, the United States agreed to protect the Yankton Sioux in their "quiet and peaceable possession" of the tract reserved to them. Article 10 of the Treaty provided that "[n]o white person," with certain exceptions, "shall be permitted to reside or make any settlement upon any part of the tract herein reserved for said Indians, nor shall said Indians alienate, sell, or in any manner dispose of any portion thereof, except to the United States." The government also agreed to pay the Yankton Sioux or to expend for their benefit, starting the year of their settlement upon the reservation, the total sum of $1.6 million in annuities over a period of fifty years, ending in 1908. The government also agreed to expend additional amounts during the first year of the Tribe's settlement on the reservation for the purchase of stock, agricultural implements, and fencing, and for the construction of houses, schools, and other buildings.

In July 1859, United States Agent Alexander Redfield founded the Yankton agency between Chouteau Creek and Fort Randall. H. Hoover, *A Yankton Sioux Tribal Land History* at 3 (1995). (Pl. Ex. 31.) The Yanktons' head chief, Struck By The Ree, followed, and within a few months, some 2,000 tribal members pitched tipis close to the agency. Eight band chiefs helped to settle the tribal members on the reservation. *Id.* The Yanktons entered a "revolution in life style as they accepted confinement on the reservation." *Id.*

In 1859, surveyors marked the outer boundaries of the reservation and surveyed 166 rectangular lots for family assignment, 87 of which were downstream and 79 of which were upstream from the agency. *Id.* at 4. By 1860, there were 2,053 Yanktons on the reservation, segregated into seven bands. *Id.* A "Chief Farmer" managed the 360.73-acre agency compound at Greenwood, on the Missouri River, and "supervised agricultural development and acculturation across the reservation." *Id.* at 5.

In the years that followed the 1858 Treaty, the federal government did not provide the Yanktons all of the financial assistance promised. Settled close to the Missouri River or in the breaks of the Missouri Hills, the Yanktons broke prairie sod, opened farms, and built log homes. Report of the Commissioner of Indian Affairs at 424 (Oct. 1, 1891). (Gov't. Ex. 18.) Drought set in and burned up the crops, followed by devastating floods. As a result, the Yanktons believed that the Great Spirit was offended at them for cultivating the soil. *Id.* "Their work oxen and cows were soon in the soup, farm tools and wagons were soon thrown aside to rot, their clothing was cast off, and the whole nation went off on a buffalo hunt." *Id.* Upon their return many months later, the Yankton Sioux "found the Santees, their old-time allies, had opened up a horrid frontier war against the whites, and that emissaries from the hostile bands were waiting to counsel with them to engage the Yanktons also in hostilities against the Government." *Id.*

In 1864, when the Santee Sioux were raiding and killing the settlers of Minnesota, General Sully, at Fort Randall, enlisted in the service of the United States as scouts fifty-one Yankton Indians. "They took the field at once against their own kindred in defense of the white inhabitants of Dakota and Nebraska, and drove back the hostile Santees." Report of the Commissioner of Indian Affairs at 48 (1878). (Gov't. Ex. 18.) The Yankton scouts were honorably discharged at the end of the war, but without any pay, *id.*, a matter that would surface as a major point of contention with the Yanktons during discussions about the sale of their surplus lands in 1892. In the early 1880's, the Yankton Sioux claimed that, unlike other Indian tribes, "the blood of no white person stains their hands." Report Of The Commissioner of Indian Affairs at 61 (1881). (Gov't. Ex. 18.) The Yanktons viewed themselves as "[a]lways at peace and friendly even to taking up arms against their own relations," and believed that, as a result, they "should receive greater consideration and benefit from [the white] people and government; that on the contrary they receive less, while those who fought the government imbued their hands in white man's blood, and obtain all they ask." *Id.*

In 1869, Moses K. Armstrong conducted a second survey of family lots on the Yankton Sioux Reservation, marking 177 lots of 80 acres each. H. Hoover, *A Yankton Sioux Tribal Land History* at 5 (1995). (Pl. Ex. 31.) In 1874, J.W. Beaman surveyed additional lots of 40 acres each, to make one available for each

family. While several missionaries visited the reservation, Presbyterian John P. Williamson arrived as the first resident missionary in 1869, and Episcopal Father Joseph Cook settled in Greenwood in 1870 *Id.* at 4. As mission and federal facilities were built, "agency personnel gradually replaced 'recalcitrant' band chiefs with others more amenable to federal objectives[.]" *Id.* The growing population of non-Indian farmers, businessmen, and railroad men in the Upper Midwest pressured federal officials to open the surplus lands of Indian reservations for settlement.

"The decade of the 1860's was marked by an increasing volume of general Indian legislation [by Congress], coincident with a decline in the use of Indian treaties as an instrument of national policy. . . . The formative era of Indian relations ended with the Appropriations Act of March 3, 1871, providing for the termination of treaty making with Indian tribes." F. Cohen, Handbook of Federal Indian Law 126-27 (1982) (footnote omitted) (hereinafter Cohen). Codified at 25 U.S.C. § 71, the statute provided:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.

At least one commentator suggests that the "end of treaty making assumes an exaggerated historic importance unless understood in light of the comprehensive nature of federal involvement in Indian affairs." Cohen at 127 (footnote omitted). In the commentator's view,

> [t]he primary reason for the termination of treaty making in 1871 was political, the result of the House of Representatives' desire to have more control over Indian affairs and over the lands being ceded by the tribes. The federal-Indian relationship continued much as it had before 1871. Negotiations with tribes and land cessions resulted in "agreements" rather than treaties, and were ratified by both houses of Congress. Congress continued to establish reservations, make appropriations, and enact statutes affecting Indians. Like treaties, agreements and statutes are the "supreme law of the land," creating rights and liabilities that are virtually identical to those established by treaties.

Cohen at 127 (footnotes omitted). The prohibition on treaty-making "was a domestic political decision with little legal impact on the continuing relationship between the United States and Indian tribes[,]" and caused the federal government to look to other procedural methods in dealing with the Indian tribes. *Id.* at 128.

After 1871, a trend developed toward more comprehensive legislation as the government gradually moved away from the "tribe-by-tribe approach of

the treaty making years. The result was a steady increase in statutory power vested in Indian service officials and a steady narrowing of the rights of individual Indians and tribes." Cohen at 128. The process of allotment of tribal lands in severalty and the assimilation of the Indians into white culture was deemed to be important for Indians and non-Indians alike. *Id.* Years of debate on allotment proposals followed. *Id.* at 131.

On February 8, 1887, Congress passed the General Allotment Act, also known as the Dawes Act, 24 Stat. 388, which mandated the allotment of land to individual tribal members on the reservations and negated the previous family assignments of land parcels. H. Hoover, *A Yankton Sioux Tribal Land History* at 5-6 (1995). (Pl. Ex. 31.) The Dawes Act did not expressly mandate the elimination of reservations. Senator Dawes, sponsor of the bill, had favored a voluntary program of allotments, but eventually supported compulsory allotment because he became convinced, like the humanitarian reformers, that destruction of the tribal system was inevitable if Indians were to participate fully in the American system. Cohen at 131. Allotments of land to individuals were thought to be of primary importance because the Indian concept of tribally-owned land was fundamentally different from the whites' concepts of civilization and individual land ownership, and the whites' view was considered to be superior. *Id.* White reformers also thought that a government patent would create greater security for the Indian allottee than

would possession of land under tribal law or custom and that settling the Indians in a permanent place would end their nomadic behavior. Indians who favored allotment placed faith in the patent in fee as protection against white encroachment and removal by the government. Cohen at 132.

The Dawes Act provided:

> That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon[.]

24 Stat. 388. Each head of a family was to receive one quarter section of land (160 acres), each single person over eighteen years of age and each orphan child under eighteen years of age was to receive one-eighth of a section (80 acres), and each single person under eighteen years of age or born prior to the date of the President's order directing allotment of the land was to receive one-sixteenth of a section (40 acres). *Id.* The Dawes Act further provided in section 5 that, upon approval of the allotments by the Secretary of

the Interior, the Secretary would issue a patent in the name of each allottee, to be held in trust by the United States for twenty-five years for the sole use and benefit of the Indian allottee, and in the case of the allottee's death, for the sole use and benefit of the allottee's heirs. Section 5 provided that, at the end of the trust period, the United States would convey the allotment

> in fee, discharged of said trust and free of all charge or incumbrance whatsoever . . . And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void[.]

24 Stat. at 389. Congress gave the President authority to extend the trust period in his discretion. *Id.*

Section 5 of the Dawes Act, significantly for this litigation, further provided:

> That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, *of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell,* on such terms and conditions as shall be

> considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress[.]

24 Stat. at 389-90 (emphasis added).

The Dawes Act stated in section 6 that, upon completion of the allotments and the issuance of patents to the allottees, the allottees would be subject to the civil and criminal laws of the State or Territory in which they resided. Moreover, each allottee "who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States." *Id.* at 390.[1]

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[1] In 1905, the Supreme Court interpreted section 6 of the Dawes Act "to mean that Indian allottees were subject to plenary state jurisdiction immediately upon issuance of the trust patent *See In re Heff,* 197 U S 488, 25 S Ct. 506, 49 L.Ed. 848 (1905)." *Cass County v Leech Lake Band of Chippewa Indians,* 524 U S 103, 118 S Ct 1904, 1907, 141 L Ed.2d 90 (1998) Congress reversed the result of the *Heff* case in 1906 by passage of the Burke Act, 34 Stat 182, 25 U.S C. 349, *et seq* , providing that state jurisdiction did not attach until the end of the 25-year trust period, when the lands were conveyed in fee to the allottees *See United States v Pelican,* 232 U.S 442, 450, 34 S Ct. 396, 399, 58 L Ed 676 (1914). The Burke Act, however, also contained a proviso permitting the Secretary of the Interior, if "satisfied that any Indian allottee is competent and capable of managing his or her affairs," to authorize issuance of a fee simple patent before the end of the usual trust period, removing all restrictions as to sale, incumbrance, and taxation of the land. *Cass County,* 524 U S at ___, 118 S.Ct at 1907 The effect of the

(Continued on following page)

Some of the Yanktons resisted the new allotment policy, and four companies of troops were sent from Fort Randall to quell the disturbances and restore order. H. Hoover, *A Yankton Sioux Tribal Land History* at 6 (1995). (Pl. Ex. 31.) Allotting Agent J. G. Hatchett arrived in 1889 to parcel out the individual allotments on the Yankton Sioux Reservation. *Id.* Protests by the Indians hampered his work, *id.*, but the allotments were completed that year and in 1890, Hatchett equalized the allotments, utilizing approximately one-half of the reservation. Report of the Commissioner of Indian Affairs at 428 (Oct. 1, 1891). (Gov't. Ex. 18.) Hatchett continued to refine the list of allotments, and in 1892 reported the assignment of 1,700 allotments on approximately 262,000 acres of the Yankton Sioux Reservation. H. Hoover, *A Yankton Sioux Tribal Land History* at 6 (1995). (Pl. Ex. 31.) Hatchett's report negated all previous land assignments, and tribal members were required to scatter on their new family farms located across the reservation. *Id.* at 6 & n. 15.

Of the 430,495 acres of land comprising the 1858 Yankton Sioux Reservation, 167,325 acres were allotted and patented to the Indians under the Dawes Act. By early 1894, allotments under the Act of February 28, 1891, 26 Stat. 594, had been made in the field, but those allotments had not been examined

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Burke Act and other post-ratification statutes on the Yankton Sioux allotments will be addressed later in this opinion

and approved. The federal government estimated that some 95,000 additional acres had been allotted after passage of the 1891 Act, leaving surplus lands of approximately 168,000 acres, which were ceded by the Yankton Sioux for $600,000, or $3.62 per acre.[2] S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 5 (1894); (Pl. Ex. 5.)

Congress having officially ended treaty-making with the tribes in 1871, the last large-scale sale of land to the United States by the Yankton Sioux Tribe occurred as a result of an 1892 Agreement, after an 1884 government attempt to obtain the sale of the Yanktons' surplus lands failed. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 12 (1894); (Pl. Ex. 5.) In 1892, the Secretary of the Department of the Interior appointed three members to serve on the Yankton Indian Commission to negotiate the sale of the surplus land owned by the Yankton Sioux. (Pl. Ex. 28.) The three commissioners were John J. Cole, J. C. Adams, and Dr. W. L. Brown; however, Dr. Brown resigned from the Commission before an agreement was reached, and his replacement, L. W. French, was never qualified to act as a Commissioner and took no part in the negotiations. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 7-8, 34 (1894); (Pl. Ex. 5.) These

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[2] The Court of Claims later determined that the Yankton Sioux ceded 201,110 unallotted acres in the 1892 Agreement and that those acres had a fair market value of $1,337 381 50, or about $6 65 per acre, on December 31, 1892 *Yankton Sioux Tribe v. United States*, 224 Ct Cl. 62, 623 F.2d 159, 174 (1980).

discussions did not take place with tribal leaders in Washington, D.C., as had the negotiations resulting in the 1858 Treaty. The Commissioners were sent to the Yankton Sioux Reservation "to negotiate . . . for the cession of their surplus lands," and "[i]f [the Yankton Sioux] are unwilling to cede all the surplus land you will endeavor to obtain the relinquishment of such part thereof as they may be willing to part with."[3] Instructions to the Yankton Indian Commission (July 27, 1892), reprinted in *Yankton Sioux Tribe* U.S. Supreme Court Joint Appendix Vol. I at 98-99.

Although the 1894 Congress and courts have been careful to distinguish between the 1858 "Treaty" and the 1892 "Agreement," *see, e.g.*, S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 1 (1894) (Pl. Ex. 5.); *Yankton Sioux Tribe*, 522 U.S. at ___, 118 S.Ct. at 793, the Commissioners sent to the reservation and the Yankton Sioux repeatedly mentioned during the 1892 discussions concerning the sale of surplus lands that their work would result in a "treaty" that would be ratified by Congress. Before the Commissioners left the Yankton Sioux Reservation for Washington to present the 1892 Agreement to Congress, a copy of the Agreement was left in the Yanktons' treaty book, which was turned over to Rev. Williamson for

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[3] The Court agrees with the Eighth Circuit's earlier conclusion from these instructions that, "[h]ad the intent been the elimination of the reservation, it would have been necessary that all surplus lands be purchased." *Yankton Sioux Tribe*, 99 F.3d at 1452

safekeeping. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 48-96, 97 (1894). (Pl. Ex. 5.) Moreover, then Secretary of the Interior Hoke Smith, in the first sentence of his 1894 cover letter submitting the Agreement and the reports of the work underlying it to Congress, stated that he had the honor "to submit herewith an agreement made by the commission appointed to treat with the Yankton tribe of Dakota or Sioux Indians[.]" *Id.* Similarly, the Acting Commissioner of Indian Affairs referred to the Agreement as a "treaty" in his report to the Secretary of the Interior, *id.* at 5, and those chiefs and head men of the Yankton Sioux Tribe who wrote to Congress urging ratification of the Agreement referred to it as the "treaty of December 31, 1892." S. Rep. No. 196, Committee on Indian Affairs, 53rd Cong., 2d Sess. at 2 (1894). (Pl. Ex. 7.)

These references to treaty-making by the primary participants are significant, because the references establish that the Tribe, which likely was not aware that Congress technically had ended treaty-making by statute in 1871, nonetheless continued to view its interactions with the federal government within the historic context of the political relationship that had existed between the Tribe and the federal government beginning with the Treaty of 1815. The references also confirm the commentator's view that the "federal-Indian relationship continued much as it had before 1871[,]" Cohen at 127, and that the only major difference between a "treaty" and an "agreement" was that both Houses of Congress had to ratify

an "agreement," while only the Senate ratified a treaty.

II. The Sale of Surplus Lands and the 1892 Agreement

The crucial question presented is whether the 53rd Congress, legislating during the allotment era, intended by the Act of 1894, ratifying the 1892 Agreement with the Yankton Sioux, to disestablish the Yankton Sioux Reservation completely. This becomes a highly complicated question in light of the Supreme Court's *Yankton Sioux Tribe* decision holding that the Yankton Sioux Reservation is diminished to the extent of the surplus lands sold through the 1894 Act. Diminishment ordinarily suggests a shrinking of the land mass reserved to the tribe, with a clear demarcation between the land removed from reservation status, and the land retained in reservation status. *See, e.g., Rosebud*, 430 U.S. at 606-615, 97 S.Ct. at 1373-1377 (holding that congressional acts diminished boundaries of Rosebud Reservation by removing from reservation land situated in four counties of South Dakota).

Such a clear demarcation is not present here, where the Yankton Sioux allotments purposely were interspersed over the entire 1858 reservation to help ensure that the Indians would live closely with the whites who settled on the intermingled ceded lands and thereby assimilate into white culture. The Supreme Court recognized that diminishment ordinarily

affects the placement of reservation boundaries, *see Yankton Sioux Tribe*, 522 U.S. 329, ___, ___, 118 S.Ct. at 798, 799, 800, 139 L.Ed.2d 773, but nowhere in its opinion did the Supreme Court explain how the Yankton Sioux Reservation boundaries changed as a result of the diminishment. The court stopped short of holding the Yankton Sioux Reservation terminated or disestablished as it could have done if it thought *DeCoteau* was controlling, *id.* 522 U.S. 329, 118 S.Ct. at 805, and instead signaled at points in its opinion that perhaps the reservation is not disestablished. *Id.* 522 U.S. 329, 118 S.Ct. at 801, 805. The Supreme Court spoke of Congress intending by the 1894 Act "to modify the reservation," *id.* 522 U.S. 329, 118 S.Ct. at 798, or to work "a reconception of the reservation[.]" *Id.* 522 U.S. 329, 118 S.Ct. at 802. The Supreme Court did not elaborate upon how such a modified or reconceived reservation should be envisioned. If the original exterior boundaries remain, as it appears they do from the Supreme Court's opinion, then the Supreme Court has effectively created within those boundaries an "'impractical pattern of checkerboard jurisdiction,'" a result which the Supreme Court in the past has disfavored as contrary to the approach preferred by Congress and codified at 18 U.S.C. § 1151, to avoid jurisdictional confusion. *See Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478, 96 S.Ct. 1634, 1643-44, 48 L.Ed.2d 96 (1976) (quoted case omitted); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 358, 82 S.Ct. 424, 428-29, 7 L.Ed.2d 346 (1962). Because the Supreme Court has not explained how

the diminishment affected reservation boundaries, this Court "cannot assume that Congress would intend to change the reservation to an area without defined boundaries and, in addition, create a confusing checkerboard pattern of jurisdiction." *United States v. Long Elk*, 565 F.2d 1032, 1039 (8th Cir.1977).

The Tenth Circuit confronted an identical boundary problem following the Supreme Court's diminishment decision in *Hagen*. *See Ute Indian Tribe of Uintah and Ouray Reservation v. Utah*, 114 F.3d 1513 (10th Cir.1997), *cert. denied sub nom. Duchesne County v. Ute Indian Tribe of Uintah and Ouray Reservation*, 522 U.S. 1107, 118 S.Ct. 1034, 140 L.Ed.2d 101 (1998). The *Hagen* decision, which affirmed a judgment of the Utah Supreme Court, directly conflicted with a prior en banc decision of the Tenth Circuit that the Uintah Valley Reservation was not diminished or disestablished. After *Hagen*, the Tenth Circuit recalled its mandate and modified its previous decision only to the extent necessary to reconcile the opinion with *Hagen*. *Ute Indian Tribe*, 114 F.3d at 1528. The Tenth Circuit held, consistently with *Hagen*, that Acts of Congress between 1902 and 1905 diminished the reservation to the extent of the unallotted lands that were opened to non-Indian settlement, but that the Acts did not entirely disestablish the reservation. *Id.* The court concluded that the original exterior reservation boundaries remained intact and that all lands originally allotted to tribal members remained within the limits of the

reservation and constituted Indian country under 18 U.S.C. § 1151(a), even though a substantial portion of those allotted lands had passed into fee status after 1905. *Id.* 114 F.3d at 1529-30. When given the opportunity to grant a petition for certiorari and review the Tenth Circuit's decision, the Supreme Court declined and denied the petition for a writ of certiorari.

The disestablishment question now before this Court closely mirrors the issue before the Tenth Circuit in *Ute Indian Tribe*, and the Court draws some guidance from that opinion. But each agreement with an Indian tribe is different and must be evaluated in light of all the circumstances attendant to its making. *Hagen*, 510 U.S. at 410-13, 114 S.Ct. at 965-66. Thus, the Court begins its analysis from the familiar legal premise that Congress created the Yankton Sioux Reservation in the 1858 Treaty, and only Congress can eliminate it by explicitly indicating its intent to do so. *See Solem v. Bartlett*, 465 U.S. 463, 470, 104 S.Ct. 1161, 1166, 79 L.Ed.2d 443 (1984). The Supreme Court "does not lightly conclude that an Indian reservation has been terminated," *DeCoteau*, 420 U.S. at 443, 95 S.Ct. at 1092, and this Court likewise will not lightly reach such a determination. Once Congress has established a reservation, all tracts included within it are a part of the reservation until separated from it by Congress. *Id.*, 420 U.S. at 443, 95 S.Ct. at 1092-93. The 1894 Act of Congress which opened the Yankton Sioux Reservation to allow non-Indians to purchase land and settle there and which, according to the Supreme Court, diminished

the size of the reservation only to the extent of the ceded lands, is not inconsistent with the preservation of the 1858 Treaty boundaries. *See Solem*, 465 U.S. at 470, 104 S.Ct. at 1166; *DeCoteau*, 420 U.S. at 444, 95 S.Ct. at 1093. Ambiguities must be resolved in favor of the Yankton Sioux, *see Hagen*, 510 U.S. at 411, 114 S.Ct. at 965, and the Supreme Court "requires that the 'congressional determination to terminate . . . be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.'" *DeCoteau*, 420 U.S. at 444, 95 S.Ct. at 1093. Thus, to follow the disestablishment inquiry as defined in *DeCoteau*, the Court must consider the language of the 1894 ratification statute and the 1892 Agreement it incorporated, as well as the legislative history of the Act, and the surrounding historical circumstances.[4]

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[4] While one might reason that subsequent acts of Congress should be examined to see if they shed any light on the meaning of the 1894 Act, the Supreme Court disapproves of such an approach, noting that "'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one'" *Yankton Sioux Tribe*, 522 U.S. at ___, 118 S.Ct. at 803, 139 L.Ed.2d 773 (quoted case omitted). It appears, moreover, that the Supreme Court similarly eschews giving weight to evidence explaining the actions of the President and the executive departments in implementing the intent of Congress or to evidence showing the understanding of non-government parties. In reaching its decision that the Yankton Sioux Reservation is diminished, the Supreme Court summarily dismissed "the scores of administrative documents and maps marshaled by the parties to support or contradict diminishment" because such evidence had "limited interpretative value." *Id.* 522 U.S. 329, 118 S.Ct. at

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The Court believes it is helpful to begin with the historical circumstances surrounding the making of the 1892 Agreement as documented in the reports of the Yankton Indian Commission. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 48-97 (1894); (Pl. Ex. 5.) (hereafter "Negotiations".) These detailed reports provide clear insight into the mindset of the Commissioners and the Yankton Sioux as they negotiated for the sale of the surplus lands. These reports were included in the legislative history of the 1894 Act ratifying the 1892 Agreement, and the Senate and House Reports forwarding the Act from the Committees on Indian Affairs to the floor called special attention to the report of the Yankton Sioux Commission and all of their proceedings. S. Rep. No. 196, Committee on Indian Affairs, 53rd Cong., 2d Sess. at 1 (1894) (Pl. Ex. 7); H. Rep. No. 570, Committee on Indian Affairs, 53rd Cong., 2d Sess. at 1 (1894). (Pl. Ex. 8.)

A. The Reports of the Yankton Indian Commission

The Commissioners held ten councils which were attended by the Indian Committee of 24 named to

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803-04. Rather, for the foundation of its decision, the Supreme Court relied upon the "strong textual and contemporaneous evidence" to find diminishment *Id.* 522 U S at ___, 118 S Ct at 804 Thus Court likewise focuses upon the strong textual and contemporaneous evidence surrounding the 1894 Act and the making of the 1892 Agreement to determine that the Yankton Sioux Reservation was not disestablished.

represent the Yankton Sioux Tribe, the ten moderators, the chiefs, the head men, and varying numbers of members of the Tribe. The first two of the ten councils occurred on October 8th and 24th of 1892, and the remaining eight councils occurred between December 2nd and 17th of 1892. Very little, if any, discussion during the councils was directed to hammering out the terms of the twenty Articles that ultimately became the 1892 Agreement. Negotiations at 48-97. Tribal members generally spoke in favor of or in opposition to the sale of the surplus lands, expressing explicitly their perceived view of themselves as ignorant and inferior to the wiser, educated Commissioners. *Id.* at 52.[5] The Indians' speeches were laced with suspicion and distrust of the United States because of previous unhonored treaty terms, and with paramount concern for the price the United States would pay for the surplus lands. The Committee of 24 developed a list of twelve propositions, or grievances, that the Tribe wanted addressed in the agreement to sell the surplus lands. *Id.* at 52, 57. The Commissioners eventually agreed to incorporate as many of the propositions as their instructions from Washington

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[5] In deciding a dispute over the western boundary of the Yakima Indian Reservation in 1913, the Supreme Court said that its "effort must be to ascertain and execute the intention of the treaty makers, and as an element in the effort we have declared that concession must be made to the understanding of the Indians in redress of the differences in the power and intelligence of the contracting parties." *Northern Pacific Ry Co. v United States*, 227 U S 355, 362, 33 S Ct 368, 371, 57 L.Ed 544 (1913)

would allow. *Id.* at 60. Along the way, however, the Commissioners attempted to convince the Indians that they could not resist the tide of change, that the President and the Secretary of the Interior were their friends, that the United States had fulfilled all terms of the 1858 Treaty, that the United States would deal fairly with the Indians, and that sale of the surplus lands was in the Tribe's best interest. *Id.* at 65-69.

What is clear throughout the Commissioners' reports of their councils with the Tribe is that their mission was to obtain the sale of the surplus lands, and no more. This Court, the Eighth Circuit, and the Supreme Court each acknowledged in the previous stage of this litigation that the parties, in reaching the 1892 Agreement, did not discuss the future boundaries of the reservation or the relinquishment of the entire reservation by the Tribe, but memorialized only the consent of the Tribe to sell the surplus lands remaining after the allotment process was completed. *Yankton Sioux Tribe,* 890 F.Supp. at 883-84; *Yankton Sioux Tribe,* 99 F.3d at 1453; *Yankton Sioux Tribe,* 522 U.S. at ___, 118 S.Ct. at 795. If the Commissioners had intended to terminate the reservation and communicated that to the Indians, that would have made their mission even more difficult.

Comments made by the Commissioners during the councils with the Yankton Sioux support the conclusion that the Commissioners and the Tribe did not perceive their work as causing a complete disestablishment of the reservation. In his earliest comments during the first council with the Tribe,

Commissioner Adams stated, "We understand that you each received an allotment of land on which to make a home. . . . we also understand that you own, outside of your allotments, a large quantity of land in common. It is this land that you own in common that we were appointed by the Great Father to talk to you about." Negotiations at 48. Although these comments immediately bring to mind the Dawes Act and the policies behind it, what Commissioner Adams had to say to the Tribe just a few moments later is striking. He said: "It might be, after you sold your lands, you could have this reservation organized as a separate county. If this could be done – I do not say it can – you could govern your own people in your own way, so long as you obeyed the laws of the State. I do not say this can be done, but see no good reason why it might not be done." *Id.* Commissioner Adams apparently held the view that the allotment policy and tribal self-government could co-exist, and he set the tone for the negotiations by conveying such a view in his very first address to the Tribe.

Likewise, during the first council, Commissioner Cole told the Indians that the "Great White Father . . . does not want you to sell your homes that he has allotted to you. He wants you to keep your homes forever. He only wants you to sell your surplus lands for which you have no use." *Id.* at 49. Cole assured the Indians, "[y]ou not only have a home as a tribe, but every man, woman, and child among you each now has a home which no one can take away from you and the Great White Father wants you to always

keep these homes and live on them in peace and comfort like white men, and be citizens and have plenty." *Id.* Cole also remarked, "The Great Father and his Great Secretary [of the Interior], Mr. Noble, think you have acted wisely in selecting your homes in severalty. . . . They have sent us here to buy these surplus lands for homes for white men who will settle among you; who will live peaceably and neighborly with you; who will cultivate these surplus lands and make your allotted lands much more valuable." *Id.* at 50. In response to the statements of Adams and Cole, Henry Stricker replied, "if you will help us we hope we will make a treaty that will be beneficial to us as a tribe." *Id.*

At the second council, the tribal members asked to see the form contract held by the Commissioners, which was produced. Remarkably, a question arose whether the tribal members would be permitted to make comments about the provisions contained in the form agreement, and this apparently generated extensive discussion. The Commissioners reported to Congress that "[i]t was finally agreed that [the agreement] should be translated to the council and such comments as may be made by any of the committee of 24, could not, and should not be considered final." *Id.* at 51. The contract was then read article by article through oral translation into the Dakota language and, at the Tribe's request, the contract was also translated in a written form for use and consideration by the Committee of 24. *Id.* With that, the council ended.

In the series of eight councils that occurred during the sixteen-day period from December 2 to December 17, 1892, more comments were made suggesting that the Commissioners and the tribal members thought the intent of the "Great White Father" was to open the reservation for settlement rather than to disestablish it. Robert Clarkson, a member of the Tribe, said, "White men see our surplus lands every day traveling through it. They have a lawyer sent to Congress to open this reservation and surplus land." *Id.* at 61. Commissioner Brown acknowledged that the 1858 Treaty "set aside for your people a reservation with certain boundaries[,]" which was supposed to contain 400,000 acres. *Id.* at 66. He admonished the Tribe to consider that, when the reservation was surveyed, it actually contained 430,495 acres, "more than the Government agreed to let you have." *Id.* He assured the Indians that "schoolhouses will be put up all over the agency[.]" *Id.* at 67.

To convince the Indians that the strong federal government was looking out for the interests of the poorer Tribe, Commissioner Brown gave as an example two Indians, one strong and well-looking, and one half-starved, asking the Commissioners to divide a piece of beef between them. He said "it would be natural and right to give the one who was sick more than the other . . . and if we make this treaty we want to give you the biggest half." *Id.* at 67. Commissioner Cole named as the "principal object of the treaty" to make both the allotted and the surplus

lands valuable, *id.* at 68, and explained potential differences in income to tribal members, to be derived primarily from land rent, "after the surplus lands have been occupied by white people." *Id.* at 69. A dominant theme of the Commissioners was that the government wanted the Indians to live close to the white settlers so that the Indians could emulate the non-Indians, *see id.* at 71-72, but the reason given was not the government's desire to eliminate the reservation. Rather, the Commissioners reminded the Indians that, with the loss of wild game and a declining ability to roam and hunt as in the past, the Indians needed to adapt to the changed conditions around them, and to learn to obtain their food, clothing, and income like white men. *Id.* at 71-72.

Commissioner Adams instructed the Indians as to how they might rent the uncultivated portions of their allotments to white men to generate cash income, using as an example his personal experience at the Sissetons' reservation. *Id.* at 72-73. The Commissioners had already told the Yanktons that the $2.50 per acre that the United States paid the Sisseton-Wahpeton Sioux Tribe for the surplus lands on the Lake Traverse Reservation in 1891, the year before, was the highest price Congress had ever paid for surplus Indian lands. *Id.* at 68. Despite the Sissetons' sale of all of their surplus lands, Commissioner Adams viewed the Lake Traverse Reservation as still in existence:

> Here is the line of the Sisseton Reservation in my county. I live here, about 15 miles from

> the line of the Sisseton. Right here lives a friend of mine by the name of Vick, just outside the reservation line. Just inside of the line of the reservation lives an Indian friend of mine by the name of Chunek. He has land which has plenty of grass upon it. Vick asked Chunek to let him cut grass on his land. He agreed to and Vick was to pay 50 cents per ton for all he cut. This man cut 150 tons of hay and paid Chunek $75 for it. Chunek did not do anything but lie in the grass and see others work and got $75. It was just as if Chunek had gone out into the middle of the road and picked it up. Now, my friends, what made the grass on Chunek's farm worth money? Because his tribe had sold their surplus land and he had become a citizen of the United States and could rent his land. This he could not do until the surplus land was sold to the Government. If this Indian can do this why cannot you?

Id. at 72. Considering these remarks, and this Commissioner's earlier comments that it might be possible to "have this reservation organized as a separate county[,]" and "you could govern your own people in your own way, so long as you obeyed the laws of the State[,]" the Yankton Sioux reasonably could have concluded that, as a result of the sale of their surplus lands, the "Great Father" would, in time, make them citizens of both the State of South Dakota and the United States, and yet permit them to continue to govern themselves as a Tribe on the allotted lands.

Despite all of the efforts of the Commissioners, during the council on December 10, 1892, some tribal members reported the Indians had stayed up night and day debating the matter, but had decided not to sell their surplus lands. *Id.* at 73. Other tribal members disagreed, saying the Tribe was willing to sell, but the only disagreement was price. Commissioner Cole became adamant:

> Now, I want you to understand that you are absolutely dependent upon the Great Father today for a living. Let the Government send out instructions to your agent to cease to issue these rations, let the Government instruct your agent to cease to issue your clothes. Let the Government instruct him to cease to issue your supplies, let him take away the money to run your schools with, and I want to know what you would do. Everything you are wearing and eating is gratuity. Take all this away and throw this people wholly upon their own responsibility to take care of themselves, and what would be the result? Not one-fourth of your people could live through the winter, and when the grass grows again it would be nourished by the dust of all the balance of your noble tribe.
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> [The Great Father] did not send this commission until every one of you, down to the smallest baby, *has a home of their own on this reservation.*

Id. at 74-75 (emphasis added). From this speech and the fact that the Yanktons had lived on family allotments on the reservation for thirty-three years, the Yanktons could, and most probably did, draw the conclusion that their individually allotted lands remained in reservation status, but that the continuation of their annuities and all other forms of federal financial assistance depended upon their agreement to sell the surplus lands. Yankton Agent Foster then spoke in favor of the Agreement, but advised the Tribe not to settle on the price. *Id.* at 75. Felix Brunot called for a vote, which caused confusion and wrangling among the factions of the Tribe favoring and opposing the sale. *Id.* at 76. Commissioner Cole refused to recognize any vote because less than a majority of the adult male members of the Tribe were present. *Id.*

At the next council, the Commissioners asked the Committee of 24 to designate six individuals, representing the factions in the Tribe, to meet with the Commission to draft a treaty. *Id.* at 76-77. This proposal also met with disagreement because tribal members believed the Commission refused to recognize the stated decision of the Committee of 24, representing the Tribe, not to sell the surplus lands. *Id.* at 78. Cole defended his proposal of a subcommittee as necessary to work out the small details. The friends of the treaty appointed three members to the proposed subcommittee, but the opposition understandably did not present any members for such service. *Id.* at 78, 81.

In the last council, on December 17, 1892, Commissioner Brown resigned to eliminate any possibility that he was the cause of the Tribe's refusal to sell the surplus lands, as he had heard rumors that he was to blame. *Id.* at 79. Commissioner Cole then eloquently addressed the Tribe:

> This reservation alone proclaims the old time and the old conditions. But even here the means of your former mode of life have vanquished. The tide of civilization is as resistless as the tide of the ocean, and you have no choice but to accept it and live according to its methods or be destroyed by it. *To accept it requires the sale of these surplus lands and the opening of this reservation to white settlement.*

Id. at 81 (emphasis added). The council adjourned, and approximately two weeks later, on December 31, 1892, the Commissioners announced their completion of an Agreement for the sale of the surplus lands, after their consultation with the chiefs and head men and the white missionaries considered to be friends of the Tribe. *Id.* at 83-84.

At no point in the Commissioners' reports is there any mention, by a Commissioner or by a Yankton Sioux, of any anticipated change in the reservation boundaries or of a disestablishment or termination of the Yankton Sioux Reservation. At no point in the Commissioners' reports is there any mention of a transfer of the Yanktons' tribal sovereignty to the United States or the State of South Dakota.

On January 3, 1893, missionary John Williamson sent a letter to Commissioner Cole, stating that he thought the terms were the most liberal the Indians would get, that he had no doubt the provisions would be faithfully carried out, and "further there is no cause for apprehension that this agreement will in any way interfere with the treaty of 1858." *Id.* at 84. Joseph Cook, the Episcopal missionary, concurred with Williamson that the Agreement was advantageous for the Tribe. *Id.* A draft of the Agreement was sent to Secretary of the Interior Noble in January 1893, and his minor suggested changes were made. *Id.*

There is no indication in the Commissioners' reports that the Yanktons reached a consensus to support the Agreement. To the contrary, the Commissioners' reports in early 1893 describe vehement opposition to the Agreement and hardships the Commissioners faced in obtaining signatures to the Agreement by the majority of the adult male members of the Tribe. *Id.* at 85-97. Councils were held to read the Agreement to the tribal members, and the Commissioners waited day after day for tribal members to come to them and sign the Agreement. The Commissioners traveled across the reservation looking for elderly and infirm signatories, and even crossed into Nebraska to take the signatures of Yankton soldiers who were not present on the Yankton Sioux Reservation during the negotiations. *Id.* at 92-93. By March of 1893, the Commissioners obtained a sufficient number of signatures – 255 of the 458

members eligible to sign – and the Commission departed for Washington. *Id.* at 21, 97.

Two federal investigators were sent separately to the Yankton Sioux Reservation in 1893 to investigate allegations of fraud in the procurement of signatures on the Agreement. Indian Inspector John W. Cadman reported in November 1893 that he had uncovered only one incident of possible undue influence, but that he did not believe such had occurred in that case. He also reported that some tribal members who had signed the Agreement wished to change their minds, while others wished to sign the Agreement for the first time. *Id.* at 35. Special Agent Cooper also found no evidence of coercion by the Commissioners in reaching the Agreement. *Id.* at 95.

The Report of the Commissioner of Indian Affairs dated September 16, 1893 (Pl. Ex. 10), written before Congress ratified the 1892 Agreement, stated the Indians had "not signified their assent that such reservation might be embraced within the Territory of Dakota or State of South Dakota[,]" and further,

> Notwithstanding that all the Indians have accepted allotments and land patents have been issued to many of them for their lands, yet their relationship with local State authorities has not changed. The reservation has been within an organized county for many years, yet the county authorities decline to recognize the Indians or any of the residents of the reserve as entitled to the rights and privileges of citizenship. The

> constitution of the State of South Dakota expressly disclaims any right or title to any lands owned or held by an Indian or Indian tribe and are exempt from taxation, and this is held to disclaim any jurisdiction over the tribe, either civil or criminal, of the residents within an Indian country.
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> It is clear, then, that the United States exercises sole and exclusive jurisdiction over the reservation except in so far as it may see fit to grant the State the right to exercise its jurisdiction.

B. The Language of the 1892 Agreement and the Legislative History of the 1894 Ratifying Act

The entire 1892 Agreement and its preamble were incorporated into the 1894 ratifying statute. (Pl. Ex. 2, hereafter "Act".) Congress stated in the Act that it "accepted, ratified, and confirmed" the 1892 Agreement and:

> [t]hat the lands by said agreement ceded to the United States shall, upon proclamation by the President, be *opened to settlement*, and shall be subject to disposal only under the homestead and town-site laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common school purposes and be subject to the laws of the State of South Dakota[.]

Act at 6 (emphasis added). Congress' statement that the ceded lands shall be "opened to settlement" is ambiguous in that it does not make clear whether the Yankton Sioux Reservation is disestablished or whether the Reservation is diminished only to the extent of the ceded lands. Where there is an ambiguity in a statute, a preamble can be utilized to help discern the intent of Congress. *See Jurgensen v. Fairfax County*, 745 F.2d 868, 885 (4th Cir.1984). The preamble to the 1892 Agreement cited the 1892 appropriations act authorizing the Secretary of the Interior "to negotiate with any Indians for the *surrender of portions of their respective reservations*, any agreement thus negotiated being subject to subsequent ratification by Congress[.]" Act at 1 (emphasis added). The preamble also recited that the Yankton Sioux Tribe "is willing to *dispose of a portion of the land set apart and reserved to said tribe, by the first article of the treaty of April (19th) nineteenth, eighteen hundred and fifty eight (1858)*, between said tribe and the United States, and situated in the State of South Dakota[.]" Act at 1 (emphasis added). The emphasized portions of the preamble clearly indicate congressional intent to accept the will of the Yankton Sioux Tribe to cede only a portion of the reservation established by the 1858 Treaty. Similarly, in *Solem*, 465 U.S. at 472-74, 104 S.Ct. at 1167-68, the Supreme Court concluded that the phrase "sell and dispose" indicated congressional intent to maintain existing reservation boundaries of the Cheyenne Reservation in South Dakota. Thus, the language of the 1894 Act

of Congress contradicts any suggestion that the Yankton Sioux Reservation is disestablished.

Congress added the provision about reserving the sixteenth and thirty-sixth sections for common school purposes. The Supreme Court interpreted similar language in the Rosebud Acts as intended by Congress to conform them to the enabling legislation which admitted the State of South Dakota into the Union, and reasoned that Congress thereby intended to diminish the Rosebud Reservation. 25 Stat. 679 (1889); *Rosebud Sioux Tribe,* 430 U.S. at 599-601, 97 S.Ct. at 1369-70. In *Yankton Sioux Tribe,* the Supreme Court recognized the State's position, relying on *Rosebud,* that the school sections clause indicated a view that Congress meant to extinguish the reservation status of the ceded lands, 522 U.S. at ___, 118 S.Ct. at 801, but, referring to Article VIII, not Article VII, the Supreme Court concluded that " . . . a somewhat contradictory provision counsels against finding the reservation terminated." The Supreme Court cited its earlier conclusion in *DeCoteau* that the school sections clause implied nothing about the presence or absence of state civil and criminal jurisdiction over the remainder of the ceded lands, and the Supreme Court did not consider at all the effect of the school sections clause on the allotted, unceded lands. In *DeCoteau,* where the Lake Traverse Reservation was held to be disestablished, the Supreme Court dismissed the school sections clause in a footnote as irrelevant to the dispute before the Court. *DeCoteau,* 420 U.S. at 444 n. 33, 95 S.Ct. at 1093 n. 33. The

Supreme Court observed that the clause was not part of the agreement sent to Congress for ratification, there was no indication Congress added the clause with the intent to qualify the terms of the cession agreement, and it was Congress' usual practice to include the clause in "opening public lands to settlement[.]" *Id.*

This Court concludes that the school sections clause is equally irrelevant here, as it was in *DeCoteau,* but even if the clause is deemed relevant, a probable interpretation of it is that Congress wanted to be sure common schools would be available for all residents, Indian and non-Indian, in the opened, assimilated Yankton Sioux Reservation. If Congress had intended to disestablish the Yankton Sioux Reservation, the common school sections would have been subject to state law in any event and such language would have been wholly unnecessary.

Nothing in the explicit language of the 1892 Agreement supports disestablishment of the Reservation. The first two Articles, which were the focus of the previous *Yankton Sioux* cases, ceded to the United States the surplus lands for a sum certain and diminished the size of the Reservation. *Yankton Sioux Tribe,* 522 U.S. at ___, 118 S.Ct. at 798, 139 L.Ed.2d 773. Articles III, IV, and VI pertained to the method of payment to the Tribe of the principal and interest received upon the sale of the surplus lands, and those Articles do not shed any light on the disestablishment issue.

Many of the remaining Articles of the 1892 Agreement also do not further the disestablishment analysis. They provided for gifts of $20 gold pieces to males of the Tribe, Article VII; permitted leasing of uncultivated allotted land, Article IX; permitted religious societies to continue working among the Indians, Article X; prohibited payment of the land purchase price to the Indians to settle claims prior to the Agreement, Article XII; fixed the status of mixed bloods, Article XIII; prohibited Congress from alienating the allotments from the Indians before sale of the surplus lands to settlers, Article XIV; settled the claims of the Yankton scouts and the Tribe's claim to the Pipestone Reservation, Articles XV and XVI; provided for placement of a copy of the Agreement in the Yanktons' "Agreement Book," Article XIX; and bound both parties upon ratification by Congress, Article XX. Consequently, these Articles will not be discussed in any detail.

1. Article V

Article V provided for the set aside and use of the interest on the land purchase price to continue funding services for the Yanktons' most helpless members, for schools and educational purposes, and "for courts of justice and other local institutions for the benefit of said tribe[.]" The evidentiary record before the Court establishes that, years before the 1892 Agreement, Congress authorized the creation of an Indian police force and a Court of Indian Offenses on the Yankton Sioux Reservation, and that such a police force and a

Court of Indian Offenses operated to govern tribal affairs at the time of the ratification. H. Hoover, *Yankton Tribal Police and Court of Indian Offenses, 1859-1943* (1998). (Gov't.Ex. 16.) Article V's provision for continued funding of these and "other local institutions" signals congressional intent consistent with the continuing reservation status of the allotted lands and an intent to preserve tribal self-government within the 1858 boundaries on the allotted lands.

Section 2 of Article V solidified the understanding of the Yanktons and the Congress, consistent with the Dawes Act, that the Yanktons' land patents would be held in trust for twenty-five years, and at the end of that trust period, the Yanktons would receive from the United States a complete title to their allotted lands, and would then assume all the duties and responsibilities of citizenship. Such language indicates a congressional intent that there would be an ongoing relationship between the Yanktons and the federal government during the twenty-five year assimilation period. Because the Yanktons were not to receive patents in fee immediately, the Yanktons continued to live on land that was essentially retained in reservation status but apportioned to them individually. Such an interpretation is supported by evidence in the record showing that three U.S. Presidents – Woodrow Wilson, Calvin Coolidge, and Herbert Hoover – extended by Executive Order the trust period on certain of the allotted lands, and in each Executive Order, the President explicitly referred to

"the trust period on the allotments of Indians *on the Yankton Sioux Reservation*[.]" (Gov't. Exs. 10-12.)

Acts of Congress subsequent to the 1894 Act, such as the Burke Act of 1906, facilitated the alienation of a substantial number of Indian allotments to non-Indians by 1913, through such means as allowing the Secretary of the Interior to grant patents in fee to certain "competent" Indians prior to the expiration of the trust period and through sales of heirship lands. (Pl. Exs. 21-22; Pl. Ex. 2, 1892 Agreement, Article XI.) These sales of allotments were not always the result of arms-length negotiation. The allegations of a 1921 complaint brought by the United States on its own behalf and as guardian of certain Yankton Indians and their heirs indicates that the federal government viewed the Yankton Reservation as still in existence and gives insight into the federal government's concerns about the means by which sales of allotments were obtained. *United States v. Caster,* 271 F. 615 (8th Cir.), *appeal dismissed,* 257 U.S. 666, 42 S.Ct. 93, 66 L.Ed. 425 (1921).

The United States brought the action for the purpose of obtaining a decree adjudging the United States to be the owner of the allotted lands at issue, subject to the rights of the allottees, and for the cancellation of all conveyances of the lands made by the Indian allottees to the non-Indian defendants. *Id.* 271 F. at 616. The lands in question had been allotted under section 5 of the Dawes Act of 1887, to be held in trust for twenty-five years. *Id.* On April 20, 1916, the President of the United States by Executive Order

extended the trust period for ten more years as to the allotted lands at issue. *Id.*

The complaint alleged that, to assist the Secretary of the Interior in exercising his authority under the Burke Act of 1906, the Secretary appointed a three person commission, which included "A. W. Leech, Superintendent of the Yankton Reservation," and directed the commission to investigate the competency and capability of the "Indian allottees residing on the Yankton Reservation to manage and control their property." *Id.* After investigation, the commission submitted reports to the Secretary representing that a number of Indians, including the allottees at issue, were competent to manage and control their own affairs and recommending that the Secretary issue to them patents in fee for their allotments. *Id.* In reliance on the reports, the Secretary prepared the patents in fee, the President signed them, as did the Recorder of the United States General Land Office, and they were recorded in the appropriate books in the General Land Office. *Id.*

The complaint further alleged that the Secretary of the Interior decided to deliver the patents in fee in person. Upon his arrival in Greenwood, South Dakota, on May 12, 1916, the Secretary

> learned that he had been grossly misled as to the competency of such allottees; that they were palpably incompetent to manage and control their respective properties and were not qualified to receive patents in fee; that, while such allottees had been represented to

> him as competent, some of them were wholly untutored, and each and all of them were without business experience, were incapable of protecting his or her property, or of appreciating its true value, and were easily imposed upon by the craft and design of their more astute white neighbors; and that certain of them . . . before the execution of their respective fee patents in some cases and after such execution in others, but before the time for the delivery of the patents, had been unlawfully, secretly, and surreptitiously imposed upon by white men, and had entered into secret and unlawful agreements for the sale and disposition of their several allotments and had otherwise been duped and defrauded in relation thereto.

Id. 271 F. at 617. The Secretary of the Interior refused to deliver the patents in fee, took them back to Washington, and ordered them to be marked, "'Canceled.'" *Id.* The complaint alleged that the commissioners had likewise been misled in their investigation. *Id.*

Relying upon *United States v. Schurz*, 102 U.S. 378, 12 Otto 378, 26 L.Ed. 167 (1880), the Eighth Circuit held that the title of the United States to the lands in controversy was divested at the time of the execution and recording of the patents in fee, that delivery of the patents by the Secretary to the allottees was not necessary to transfer title, and that the title remained in the allottees, notwithstanding the Secretary's attempt to cancel the patents in fee.

Id. 271 F. at 619. The court ultimately held that the complaint failed to allege a cause of action because there was no claim of a mistake of law, but only a mistake of fact, and the allegations of fraud were too general because the complaint did not identify who made the misrepresentations to the commissioners and what the misrepresentations were. *Id.* 271 F. at 620. The record in this case reflects that similar practices occurred through the 1920's such that Indian land holdings drastically declined until Congress passed the Indian Reorganization Act in 1934. 48 Stat. 984, codified as amended at 25 U.S.C. § 461 *et seq.*

As mentioned earlier in this opinion, however, the actions of Congresses after the 1894 Act, which allowed the sales of Indian allotments before the trust period ended, "form a hazardous basis for inferring the intent of an earlier [Congress]." *Yankton Sioux Tribe*, 522 U.S. at ___, 118 S.Ct. at 803, 139 L.Ed.2d 773. Congressional intent not to disestablish the Yankton Sioux Reservation is clear from the 1894 Act, the 1892 Agreement and the surrounding contemporaneous historical circumstances. The acts of Congress in later years cannot be bootstrapped to the 1894 Act to determine the intent of the 53rd Congress when it ratified the 1892 Agreement.

Even if miscellaneous, subsequent legislation is relevant to show the ultimate consequences of the allotment policy initiated by the Dawes Act, no party or amicus curiae to this consolidated litigation has identified a specific, subsequent act of Congress that

expressly and unequivocally disestablished the Yankton Sioux Reservation. By 1934, Congress recognized the utter failure of its allotment policy and the role it played in forcing the Indian tribes into greater poverty and social destruction. That year, Congress passed the Indian Reorganization Act, which again placed primary focus upon reservations in Indian land policy, permitted the exchange of lands held by Indians and non-Indians within reservations in an effort to consolidate tribal lands, and extended indefinitely the trust period on allotted lands.

Since the 1894 Act, Congress has continued to refer to the Yankton Sioux Reservation as a continuing entity, even though the record is replete with contradictory references by federal, state, and county officials and citizens. *See* 41 Stat. 1468 (1920) (authorizing Secretary of Interior to convey to trustees of Yankton Agency Presbyterian Church, by patent in fee, premises situated *within the Yankton Indian Reservation*, county of Charles Mix, State of South Dakota); 47 Stat. 300 (1932) (dividing the United States District Court for the District of South Dakota into four divisions, and providing that "[t]he territory embraced . . . in the counties of Aurora, Beadle, . . . Charles Mix, . . . Yankton, and *in the Yankton Indian Reservation*, shall constitute the southern division of said district."); Reclamation Projects Authorization and Adjustment Act of 1992, Pub.L. No. 102-575 2005(b) (1992) (approving water project to "irrigate not more than approximately three thousand acres of *Indian-owned land in the Yankton-Sioux Indian*

Reservation . . . "). These statutory references, if relevant to the disestablishment question at all, certainly must be construed in favor of the Yankton Sioux Tribe. As the Supreme Court recognized, "the allotment era has long since ended, and its guiding philosophy has been repudiated. Tribal communities struggled but endured, preserved their cultural roots, and remained, for the most part, near their historic lands." *Yankton Sioux Tribe*, 522 U.S. at ___, 118 S.Ct. at 805. Repeated congressional recognition in statute of an existing Yankton Sioux Reservation compels this Court to do nothing other than effectuate the "present-day understanding of a 'government-to-government relationship between the United States and [the Yankton Sioux Tribe][.]' " *Id.*

2. Article VIII

The Supreme Court characterized Article VIII of the 1892 Agreement, erroneously denominated Article VII in its opinion, as a provision that "counsels against finding the reservation terminated." *Yankton Sioux Tribe*, 522 U.S. at ___, 118 S.Ct. at 801, 139 L.Ed.2d 773. Article VIII reserved from sale those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes" until "they are no longer required for such purposes." Act at 3. The Supreme Court observed that in *Solem* it had said "with respect to virtually identical language" that " '[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of

the reservation.'" *Id.* (quoting *Solem*, 465 U.S. at 474, 104 S.Ct. at 1168).[6] The Supreme Court provided no further analysis of this Article VIII issue, but immediately proceeded to discuss a different Article of the Agreement. Article VIII must nonetheless have continued to trouble the court, for in closing the opinion, it identified "[t]he conflicting understandings about the status of the reservation, together with the fact that the Tribe continues to own land in common," that cautioned it to limit its holding to the narrow issue of diminishment. *Id.* at 805. The court said it "need not determine whether Congress disestablished the reservation altogether in order to resolve this case, and accordingly [we] decline to do so. Our holding in *Hagen* was similarly limited, as was the State Supreme Court's description of the Yankton

[6] Article VIII also provided that, upon ratification, all ceded lands would be offered for sale through the proper land office, "to be disposed of under the existing land laws of the United States, to actual and bona fida settlers only." It is interesting to note that an Armour, South Dakota, bank official, Homer Johnson, wrote to the Secretary of the Interior in 1895, shortly before the Presidential Proclamation opening the lands to settlement, complaining that the State of South Dakota was attempting to file claim to certain of the surplus lands in violation of Article VIII's provision that all claims were to be disposed of under the land laws of the United States. Johnson reported that the South Dakota Constitution forbade the sale of state land for less than $10.00 per acre, and if the State were allowed to file claim, the lands would be unavailable to settlers indefinitely. (Pl. Ex. 56.)

reservation in . . . *State v. Greger*, 559 N.W.2d [854,] 867 [(S.D.1997)]." *Id.*

The Supreme Court's reference to "common ownership" by the Tribe must have referred to the Tribe's recent purchases of lands within the 1858 exterior boundaries that had at some earlier time passed from Indian allotment to non-Indian ownership. The Supreme Court would clearly have understood that it is not correct to refer to an Indian Tribe as "owning" reservation land in common because the right of Indians to their reservations was a right of use and occupancy, with the United States holding title in fee. *Spalding v. Chandler*, 160 U.S. 394, 16 S.Ct. 360, 40 L.Ed. 469 (1896). The right to use and occupancy was as sacred as the fee title of the sovereign. *United States v. Cook*, 86 U.S. 591, 19 Wall. 591, 22 L.Ed. 210 (1873).

The question of the existence of the Yankton Sioux Reservation has been presented to the South Dakota Supreme Court four times, but it appears that the issue was not fully presented by evidence until *Greger*, when the parties stipulated to incorporate the record that was before this Court in *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist. Greger*, 559 N.W.2d at 859 n. 5. As the Supreme Court noted, the South Dakota Supreme Court held in *Greger* that the Yankton Sioux Reservation is diminished to the extent of the ceded lands, as it did in *State v. Thompson*, 355 N.W.2d 349 (S.D.1984) (using term "disestablished"), *State v. Williamson*, 87 S.D. 512, 211 N.W.2d 182 (1973) (same), and *Wood v. Jameson*, 81 S.D. 12, 130 N.W.2d 95 (1964) (same).

Other than the allotments reserved to the Yanktons and held in trust for twenty-five years pending patent in fee, the Yanktons did not themselves reserve in the 1892 Agreement any lands to be held in common by the Tribe, but agreed that the United States would reserve from sale to settlers some of the ceded lands to be used for agency, school and other purposes to benefit the Tribe. The reservation of lands by the United States for the benefit of the Tribe was virtually equivalent, under the law, to reservation for the use and occupancy of the Tribe.

Following ratification of the 1892 Agreement, the United States reserved 1,252.89 acres for agency, church, and school purposes pursuant to Article VIII of the Agreement.[8] (Pl. Ex. 11.) As noted by the Supreme Court, there is some acreage within the original 1858 boundaries that has reverted to commonly held tribal or trust land. *Yankton Sioux Tribe*, 522 U.S. at ___, 118 S.Ct. at 804, 139 L.Ed.2d 773. In the late 1920's, the United States returned to the control of the Yankton Sioux Tribe some of the lands reserved in the 1892 Agreement for school purposes because they were no longer needed. (Gov't. Ex. 13.) That land, as well as other parcels the Tribe has purchased in recent years are controlled by the Tribe in common.

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[8] When the Commissioner of Indian Affairs wrote his instructions to the Yankton Commission on July 27, 1892, 852 acres had been reserved for government purposes. Instructions to the Yankton Indian Commission (reprinted in U.S. Supreme Court Joint Appendix at 99.)

The record reflects that the Tribe recently has applied to the Secretary of the Interior to take into trust certain lands purchased by the Tribe within the original 1858 exterior boundaries, and that the proceeds of the Fort Randall Casino owned and operated by the Tribe will facilitate the purchase of additional lands by the Tribe in the future. This evidence of tribal control of lands within the 1858 boundaries confirms what the Supreme Court suspected: Article VIII counsels against finding the reservation terminated.

3. Articles XVII and XVIII

Finally, two other Articles of the 1892 Agreement, Article XVII, the liquor provision, and Article XVIII, the savings clause, merit discussion as supporting the conclusion that a diminished reservation remained intact. Article XVII provided (emphasis added):

> No intoxicating liquors nor other intoxicants *shall ever* be sold or given away upon any of the lands by this agreement ceded and sold to the United States, *nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858,* and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement.

In the 1894 Act, Congress set the penalty for violation of Article XVII, which it ratified as written, at imprisonment for not more than two years and a fine of not more than $300. Act at 7. The Supreme Court agreed with the State that the most reasonable inference from the inclusion of this provision was that Congress was aware the opened, unallotted areas would, in the future, not be "Indian Country," and from this, the Supreme Court discerned an intent to diminish the reservation to the extent of the ceded lands. *Yankton Sioux Tribe,* 522 U.S. at ___, 118 S.Ct. at 801, 139 L.Ed.2d 773. Furthermore, the court said, the Commissioner of Indian Affairs described the provision as prohibiting "'the sale or disposition of intoxicants upon any of the lands *now* within the Yankton Reservation,' . . . indicating that the lands *would be severed from the reservation* upon ratification of the agreement." *Id.* (emphasis added). The court reaffirmed its prior implication of diminishment, but not disestablishment, of the Yankton Sioux Reservation in *Perrin v. United States,* 232 U.S. 478, 34 S.Ct. 387, 58 L.Ed. 691 (1914), when it said in *Yankton Sioux Tribe* that Article XVII applied to ceded lands formerly included in the Yankton Sioux Reservation. *Id.* Thus, the Supreme Court itself noted a jurisdictional distinction between the ceded lands, which were severed from the reservation, and the allotted lands, which remained in reservation status.

The inclusion of Article XVII in the 1892 Agreement supports the view that the reservation was not

disestablished. Congress outlawed the sale of intoxicating liquor in Indian Country on July 23, 1892. 27 Stat. 260. The Yankton Commissioners conducted the negotiations with the Yankton Sioux for the sale of surplus lands shortly thereafter in the fall of 1892, and there is no indication in the Commissioners' reports that either party was aware of the liquor statute when the Agreement was reached. The liquor provision was included in the list of propositions presented by the Tribe, and Article XVII as drafted and ratified prohibited liquor forever upon the ceded lands *and* upon "any other lands within or comprising the reservations of the Yankton Sioux." Had Congress intended to disestablish the reservation, Congress would have wanted to make clear that the 1892 liquor law did not apply to the Indian allotments or the ceded lands, as neither would remain "Indian Country" if the reservation were disestablished. Congress instead ratified Article XVII, and by approving the Article, evidenced its intent to preserve the reservation status of the allotted lands.

In 1916, the Eighth Circuit considered an appeal from a federal criminal conviction for the sale of intoxicating liquor on the lands *ceded* by the 1894 Act. *Cihak v. United States*, 232 F. 551 (8th Cir.1916). The appeals court cited Article XVII of the 1892 Agreement as the basis for the federal prosecution, noting that the defendant "was indicted, tried, convicted, and sentenced for selling intoxicating liquors *upon the portion of this reservation ceded to the United States.*" *Id.* 232 F. at 552 (emphasis added).

The court reversed for a new trial only because of evidentiary error. *Id.* 232 F. at 554-55. Thus, even in 1916, the Eighth Circuit recognized that the Yankton Sioux Reservation existed and that only a portion of it had been ceded. After 1894, there was not an act of Congress that changed the reservation status of the allotted lands, and state or private conduct directed to the lands in question is not sufficient to cause such a change. *See Seymour*, 368 U.S. at 354, 82 S.Ct. at 426.

Article XVIII, the savings clause, was the fulcrum of the previous *Yankton Sioux Tribe* litigation. Despite the fact that the first sentence of Article XVIII expressly stated the non-abrogation of the 1858 Treaty and the second sentence recognized the continuing "full force and effect" of the 1858 Treaty, the Supreme Court rejected the view of this Court and the Eighth Circuit that the savings clause existed for any other reason than to assure the Yanktons that they would continue to receive their annuities under the 1858 Treaty. *Yankton Sioux Tribe*, 522 U.S. at ___, 118 S.Ct. at 800, 139 L.Ed.2d 773. The Supreme Court also ruled, in rejecting an argument of the United States, that it was not persuaded to "view the savings clause *as an agreement to maintain exclusive tribal governance within the original reservation boundaries.*" *Id.* 522 U.S. at ___, 118 S.Ct. at 800 (emphasis added). Having reached the conclusion that Articles I and II of the Agreement were precisely suited to terminating reservation status of the ceded lands, it makes sense that the Supreme Court would

not interpret the savings clause as an agreement to maintain the Tribe's *exclusive* tribal governance *over the ceded lands*. The court did not comment at all upon whether it would interpret the savings clause as an agreement to maintain tribal governance over the allotted lands within the original reservation boundaries. This Court concludes that the savings clause, even if limited only to the matter of preserving the Tribe's annuities under the 1858 Treaty, creates an inference that Congress contemplated that the Tribe would continue as a political entity even after the ratification of the 1892 Agreement, that its members would continue to receive the annuity benefits promised them for fifty years under the 1858 Treaty, and that tribal self-governance during the trust period was consistent with the continuation of reservation status of the allotted lands.

4. The Legislative History

Much of the legislative history of the 1894 Act already has been discussed. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 26 (1894); (Pl. Ex. 5.) (hereafter "Legislative History"). The letters of Secretary of the Interior Hoke Smith and Acting Commissioner of Indian Affairs Frank C. Armstrong transmitting the Agreement to Congress contain no indications that the Agreement expressly disestablished the reservation or that they had any reason to believe that disestablishment would occur. To the contrary, Acting Commissioner Armstrong flatly told Congress that the "treaty makes no provision regarding the cession

or relinquishment of the reservation or any portion thereof." Legislative History at 5. Thus, Congress knew, both from Armstrong's statement and from the extensive reports of the Yankton Commissioners, that the Yanktons had not expressly consented to the relinquishment of their entire reservation, and as already shown, Congress accepted and ratified that position in the 1894 Act.

Without doubt, parts of the legislative history suggest that Congress believed the allotment of land in severalty to individual Indians would curtail "[o]ne of the greatest hindrances to the progress of these people[, which] has been their tribal mode of life and ownership of land in common, and the issue of food and clothing [given] to them by the Government." By providing "each member of the tribe a home in his own right[,]" and bringing in the "frugal, moral, and industrious" white settlers to work beside the Indians, Congress hoped to "stimulate individual effort and make their progress much more rapid than before." (Pl. Ex. 7, State Ex. 608.) Such sentiments echo the resolution of Senator Dawes and the Forty-Ninth Congress of 1887 to assimilate the Yanktons into white culture, but these comments are passing references, and they do not overcome the strong textual and contemporaneous evidence set out in this opinion establishing that the Yanktons' allotted lands retained reservation status.

III. Treatment of the Yankton Sioux Reservation after 1894

In *Yankton Sioux Tribe,* the Supreme Court, recognizing that the 1894 Act was "not so compelling that, standing alone, it would indicate diminishment," turned to subsequent congressional and administrative references to the reservation and demographic trends to support its conclusion that de facto diminishment had occurred. *Yankton Sioux Tribe,* 522 U.S. at ___, ___, 118 S.Ct. at 802-05. Even then, the court observed that the conflicting evidence was of limited interpretative value. *Id.,* 522 U.S. at ___, 118 S.Ct. at 804, 139 L.Ed.2d 773. In the *DeCoteau* disestablishment decision, the Supreme Court devoted only two paragraphs to mention of the jurisdictional history subsequent to the 1891 surplus land act, and focused its analysis entirely upon deciding whether a congressional intent to terminate the reservation was expressed on the face of the 1891 Act or was clear from the surrounding circumstances and legislative history. *DeCoteau,* 420 U.S. at 442-43, 95 S.Ct. at 1092. The *DeCoteau* approach is the one the Court has taken in this opinion, because *DeCoteau* does not place any emphasis on "de facto disestablishment," if there is such a thing, in a manner similar to the Supreme Court's diminishment cases.

The complete evidentiary record now before the Court contains scores of historical documents, cases, deeds, affidavits, and testimony from which no clear picture emerges as to a consistent treatment of the

Yankton Sioux Reservation following passage of the 1894 Act. From the time of the Proclamation of President Grover Cleveland in 1895 opening the ceded lands of the Yankton Sioux Reservation for white settlement until today, the question of jurisdiction has presented a complicated puzzle, and the hope of many that the Supreme Court's decision would solve the puzzle once and for all did not come to fruition.

The evidence before the Court shows that, at various times, and for different reasons, some political, some fiscal, and some racial, the Yankton Sioux Tribe, the United States, the State of South Dakota, Charles Mix County, and the amicus curiae municipalities have exercised jurisdiction within the original exterior boundaries of the reservation. Much of this evidence was reviewed in the Court's previous opinion in *Yankton Sioux Tribe*, 890 F.Supp. at 887-88, but more evidence was admitted in this phase of the litigation. Each political entity points to the evidence establishing its exercise of jurisdiction to support its view as to whether the reservation is disestablished or not.

Thus, the Tribe emphasizes evidence that it has in the past and today maintains a tribal police force and tribal courts, that the Tribe governs itself through a Tribal Code, and that the Yankton Sioux Constitution, as amended in 1990, claims tribal jurisdiction extending to the original exterior 1858 boundaries. (Gov't. Exs. 1-2.) The State points to its law enforcement presence, the criminal and civil

cases prosecuted in its courts, its exercise of jurisdiction over environmental matters, and the maps and various references indicating a former Yankton Sioux Reservation. Charles Mix County and the cities remind the Court of their vested interest in the lands at issue and their exercise of criminal and civil jurisdiction, including taxation. They point out that the Charles Mix county seat, as well as law enforcement and court facilities, lie on former allotted lands. They emphasize the justifiable expectations of the people living in Charles Mix County. The United States, like the State, highlights its law enforcement presence on the reservation immediately after the ratification of the 1892 Agreement and its longstanding involvement in the affairs of the Tribe.

The fact that any one of these political entities has exercised or continues to exercise any form of jurisdiction within the original exterior boundaries of the Yankton Sioux Reservation is only minimally helpful to the Court in determining whether such exercise of jurisdiction was or is proper under the law. In this opinion, the Court has reached a legal conclusion, based upon the 1892 Agreement, the text of the 1894 Act, its legislative history, and the circumstances surrounding the negotiations for the sale of surplus lands, that the reservation is not disestablished.

IV. The *DeCoteau* Result Does Not Control This Case

It is important to explain why the Court believes that the *DeCoteau* result does not control the outcome in this case. The most obvious reason is that, had *DeCoteau* controlled this case, the Supreme Court would have applied it to grant the State the relief it sought: disestablishment of the Yankton Sioux Reservation. The Supreme Court did not do so and instead signaled some concern about whether the reservation continued to exist. Throughout its opinion, the Supreme Court agreed with the broad concepts expressed in *DeCoteau*, but ultimately applied them to terminate only the reservation status of the Yanktons' ceded lands. *Yankton Sioux Tribe*, 522 U.S. at ___, 118 S.Ct. at 801.

DeCoteau is factually distinguishable from the case before the Court. In reviewing the historical context that led to the sale of all of the surplus lands in the Lake Traverse Reservation, the Supreme Court emphasized that very early on, the spokesman for the Sisseton-Wahpeton Sioux Tribe stated in the local press that "[w]e never thought to keep this reservation for our lifetime. . . . The Indians have taken their land in severalty. They are waiting for patents. The Indians are anxious to get patents. We are willing the surplus land should be sold. We don't expect to keep reservation. . . . When the reservation is open we meet as one body. We be as one." *DeCoteau*, 420 U.S. at 433, 95 S.Ct. at 1087.

The negotiations between the Commissioners and the Sisseton-Wahpeton Tribe for the sale of the surplus lands took two weeks and the *DeCoteau* opinion does not mention any disagreement that occurred among the members of the Tribe in deciding to sell their lands or any opposition registered to the agreement at all. The Indians wished to sell outright all of their surplus lands on three conditions: that each tribal member, regardless of age or sex, receive an allotment of 160 acres, that Congress settle their loyal scout claim, and that an adequate sales price per acre be paid for all of the unallotted land. *Id.*, 420 U.S. at 434, 95 S.Ct. at 1088. The agreement departed from the strict provisions of the Dawes Act because it gave the Indians a large number of allotments, each member of the Tribe receiving 160 acres regardless of age or sex, as requested by the Tribe. This approach provided the Sissetons with far more allotted land per capita than the Yanktons, for whom only heads of families received 160 acres pursuant to the Dawes Act. *Id.* 420 U.S. at 434 n. 16, 95 S.Ct. at 1088 n. 16.

The Sissetons declined to reserve other portions of the reservation for future allotments and tracts then occupied by the government for agency, school, and missionary purposes because they knew some of the principal and interest from the sale of surplus lands would be used for such purposes, and they did not think it would be proper for them to also reserve a large quantity of land for such purposes. *Id.* The Sissetons stated during negotiations that they did not

care to have an agency after the surplus lands were sold, and "[t]his little reservation is ours, and all we have left. There is nothing in our treaty that says that we must sell. It was given us as a permanent home, but now we have decided to sell[.]" *Id.* Thus, the Sissetons expressed their understanding that they would not retain a reservation after the sale of the surplus lands.

The Sisseton and Yankton Agreements are dissimilar in significant ways. In the Sissetons' agreement, there were no counterparts to Articles V, VIII, XI, XVII, and XVIII found in the Yanktons' Agreement.

The legislative history of the Sissetons' agreement shows that Congress had a much different understanding about the future of the Lake Traverse Reservation upon ratification of that agreement than it had regarding the Yankton Sioux Reservation. The report of the Senate Committee on Indian Affairs recognized that each Sisseton would receive 160 acres, a departure from the allotment act, but nonetheless recommended ratification in light of the fact "that the additional allotments are *in lieu of any residue* which, under their title, these Indians could have reserved for the future benefit of their families, and the further fact that they are soon to assume the responsibilities of citizenship[.]" *Id.*, 420 U.S. at 438-39 n. 19, 95 S.Ct. at 1089-90 n. 19 (emphasis added). The report further explained that the reservation contained 918,780 acres, 127,887 of which had been allotted to the Indians under the Dawes Act. The

additional allotments allowed by Article 4 of the agreement required 112,113 more acres, for a total of 240,002 in allotments "which [left] a surplus, *including the lands occupied by the agency and missionary societies*, of 678, 778 acres, *the Indian title to which [was] extinguished by the terms of the agreement.*" *Id.* (emphasis added).

Such an explicit statement of congressional intent to extinguish Indian title to reservation lands cannot be found in the legislative history of the Yanktons' agreement. Moreover, the Sissetons relinquished far more acreage for settlement by non-Indians than they retained for themselves, as compared to the Yanktons who, overall, retained greater acreage for their allotments than they ceded for sale as surplus lands. Congress must have known, when it ratified the Sissetons' agreement in 1891, that the opened area would be settled by more non-Indians than Indians and that truly, the Indian character of the area would be forever changed. Three years later, when Congress ratified the Yanktons' Agreement reserving a larger portion of the reservation for the Indians' allotments, and reserving land for agency, school, and religious purposes, Congress must have known that the introduction of white settlers would change the Indian character of the Yankton Sioux Reservation to a degree, but not so dramatically as the Lake Traverse Reservation.

As the Eighth Circuit observed in its prior opinion, *DeCoteau* established that only 3,000 of 33,000 people, or nine percent, living within the original

exterior boundaries of the Lake Traverse Reservation at the time *DeCoteau* was decided were Indians, while using the lower of two conflicting population figures in this record, thirty-two percent of the population within the original exterior boundaries of the Yankton Sioux Reservation is Indian. *Yankton Sioux Tribe*, 99 F.3d at 1457 & n. 26. The recent evidence introduced into the record shows that the population of Indians living on and adjacent to the Yankton Sioux Reservation has increased during the 1990's. (Gov't. Exs. 5a-c.) Moreover, the Bureau of Indian Affairs Superintendent at the Yankton Agency, Timothy Lake, testified that, in addition to the Indian students who attend the Marty Indian School, 176 Indian students attend the Lake Andes public elementary school as compared with 72 white students, and 225 Indian students attend the Wagner public elementary school as compared to 227 white students.

In *DeCoteau*, the Supreme Court emphasized that the Sisseton-Wahpeton Sioux Tribe did not establish a tribal court or legal code to exercise the jurisdiction which the Tribe claimed in a 1966 tribal constitution to extend to lands lying within the original reservation boundaries. The evidence in this case shows a tribal court operated before and after the 1894 Act and that the Yankton Sioux Tribe has adopted a legal code to exercise the jurisdiction it claims to govern its own people within the original 1858 exterior boundaries.

Under the facts presented in *DeCoteau*, it is understandable that the Supreme Court held the

reservation was disestablished by the 1891 Act because that was the precise understanding held by the Sisseton-Wahpeton Tribe itself. In light of the far different facts presented by the Yankton Agreement, it is clear why the Supreme Court did not apply *DeCoteau* to hold the Yankton Sioux Reservation disestablished. In this opinion, this Court has exhaustively enumerated many reasons, based upon the strong textual and contemporaneous evidence, why the Yankton Sioux Reservation was not disestablished, and certainly, this Court will not apply the *DeCoteau* result to hold that the Yankton Sioux Reservation is disestablished.

V. Conclusion

The result of the Supreme Court's diminishment decision and this Court's determination in this opinion that the Yankton Sioux Reservation is not disestablished is a checkerboard pattern of jurisdiction on the reservation. The Court's decision, however, produces a stable, unchanging allocation of jurisdiction. *See Ute Indian Tribe*, 114 F.3d at 1530. The Yankton Sioux Tribe and the federal government exercise primary criminal and civil jurisdiction in "Indian Country," that is, the lands within the original exterior 1858 Treaty boundaries that are or were Indian allotments or lands reserved for agency purposes, even though some of those lands may now have passed into fee status. *See Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, ___ 118 S.Ct. 948, 952 & n. 1, 140 L.Ed.2d 30 (1998); *DeCoteau*, 420 U.S.

at 427 n. 2, 95 S.Ct. at 1084 n. 2. "Indian Country" also includes rights-of-way running through the allotted and reserved areas which constitute the diminished reservation. 18 U.S.C. § 1151(a); *DeCoteau*, 420 U.S. at 427 n. 2, 95 S.Ct. at 1084 n. 2. Even in "Indian Country," the State may have jurisdiction over some persons or types of conduct, but such jurisdiction is quite limited. *See DeCoteau*, 420 U.S. at 427 n. 2, 95 S.Ct. at 1084 n. 2 (and cases cited therein). As stated in *Yankton Sioux Tribe*, 522 U.S. at ___, 118 S.Ct. at 797-98, state and local governments exercise primary criminal and civil jurisdiction over the ceded lands opened to settlement on the Yankton Sioux Reservation as a result of the 1894 Act of Congress. Although some title searches may be necessary to determine conclusively which lands were ceded under the 1894 Act, once the status of the lands is determined, the allocation of jurisdiction can be determined and jurisdiction likely will not change in the future as lands are bought and sold. *See Ute Indian Tribe*, 114 F.3d at 1530. Lands purchased by the Tribe and taken into trust by the federal government pursuant to 25 U.S.C. § 465, however, even if such lands lie within the ceded areas of the reservation, are subject to tribal and federal jurisdiction. *See Cass County*, 524 U.S. at ___, 118 S.Ct. at 1910, 141 L.Ed.2d 90.

With the interests of all parties carefully in mind, the Court reaches the decision warranted by law. It is incumbent upon the Yankton Sioux Tribe, the United States, the State of South Dakota, Charles Mix

County, and the affected municipalities, as well as each individual who resides within the affected area, to foster a spirit of communication, cooperation, and compromise in order to accommodate, as far as possible, each of the legitimate governmental, economic, social, political, and legal interests that are at stake. For all of the reasons stated,

IT IS ORDERED:

(1) that, in *Yankton Sioux Tribe v. Gaffey*, CIV 98-4042, the Court enters a declaratory judgment in favor of the plaintiffs Yankton Sioux Tribe and its individual members and in favor of the plaintiff-intervenor United States of America and against the defendants Matt Gaffey, Herman Peters, Bruce Bakken, Jack Soulek, William Janklow, and Mark Barnett holding that the 53rd Congress did not disestablish the Yankton Sioux Reservation in 1894 when it ratified the 1892 Agreement with the Yankton Sioux Tribe for the sale of surplus lands.

(2) that, in *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, CIV 94-4217, the Court enters a declaratory judgment in favor of the plaintiffs Yankton Sioux Tribe and Darrell Drapeau individually, and against the third-party defendant, State of South Dakota, holding that the 53rd Congress did not disestablish the Yankton Sioux Reservation in 1894 when it ratified the 1892 Agreement with the Yankton Sioux Tribe for the sale of surplus lands.

(3) that, in *Yankton Sioux Tribe v. Gaffey*, the Court dismisses with prejudice the counterclaims of the state defendants, William Janklow and Mark Barnett, and the county defendants, Matt Gaffey, Herman Peters, Bruce Bakken, and Jack Soulek against the plaintiffs Yankton Sioux Tribe and its individual members and the plaintiff-intervenor United States.

(4) that the Yankton Sioux Reservation, diminished by the 1894 Act only to the extent of the ceded lands, includes all of the lands within the original exterior reservation boundaries established by the 1858 Treaty with the Yankton Sioux Tribe that were later allotted to the Yanktons, as well as the lands reserved from sale for agency, school, and other tribal purposes in the 1892 Agreement.

(5) that the Yankton Sioux Reservation, as described in the preceding paragraph, is "Indian Country" within the meaning of 18 U.S.C. § 1151(a).

(6) that the Court enters a permanent injunction in favor of the Yankton Sioux Tribe, its individual members, and the United States enjoining William Janklow and Mark Barnett, in their official capacities as Governor and Attorney General of the State of South Dakota, and their officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with them, from exercising criminal law enforcement jurisdiction over members of the

Yankton Sioux Tribe who are alleged to have committed crimes on allotted or reserved lands, notwithstanding any patent, and including rights-of-way running through the Yankton Sioux Reservation as described in paragraph 4.

(7) that the Court enters a permanent injunction in favor of the Yankton Sioux Tribe, its individual members, and the United States enjoining Matt Gaffey, States Attorney of Charles Mix County, and Herman Peters, Bruce Bakken, and Jack Soulek, members of the Charles Mix County Commission, in their official capacities, and their officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with them, from exercising criminal law enforcement jurisdiction over members of the Yankton Sioux Tribe who are alleged to have committed crimes on allotted or reserved lands, notwithstanding any patent, and including rights-of-way running through the Yankton Sioux Reservation as described in paragraph 4.

(8) that all parties will bear their own attorney's fees and costs.

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522 U.S. 329

Supreme Court of the United States
SOUTH DAKOTA, Petitioner,
v.
YANKTON SIOUX TRIBE et al.
No. 96-1581.

Argued Dec. 8, 1997.
Decided Jan. 26, 1998.

*Syllabus**

The Yankton Sioux Reservation in South Dakota was established pursuant to an 1858 Treaty between the United States and the Yankton Tribe. Congress subsequently retreated from the reservation concept and passed the 1887 Dawes Act, which permitted the Government to allot tracts of tribal land to individual Indians and, with tribal consent, to open the remaining holdings to non-Indian settlement. In accordance with the Dawes Act, members of the respondent Tribe received individual allotments and the Government then negotiated with the Tribe for the cession of the remaining, unallotted reservation lands. An agreement reached in 1892 provided that the Tribe would "cede, sell, relinquish, and convey to the United States" all of its unallotted lands; in return, the Government agreed to pay the Tribe $600,000. Article XVIII of the agreement, a saving clause, stated that

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* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader *See United States v Detroit Timber & Lumber Co.*, 200 U S 321, 337, 26 S Ct 282, 287, 50 L.Ed 499

nothing in its terms "shall be construed to abrogate the [1858] treaty" and that "all provisions of the said treaty . . . shall be in full force and effect, the same as though this agreement had not been made." Congress ratified the agreement in an 1894 statute, and non-Indians rapidly acquired the ceded lands.

In this case, tribal, federal, and state officials disagree as to the environmental regulations applicable to a solid waste disposal facility that lies on unallotted, non-Indian fee land, but falls within the reservation's original 1858 boundaries. The Tribe and the Federal Government contend that the site remains part of the reservation and is therefore subject to federal environmental regulations, while petitioner State maintains that the 1894 divestiture of Indian property effected a diminishment of the Tribe's territory, such that the ceded lands no longer constitute "Indian country" under 18 U.S.C. § 1151(a), and the State now has primary jurisdiction over them. The District Court declined to enjoin construction of the landfill but granted the Tribe a declaratory judgment that the 1894 Act did not alter the 1858 reservation boundaries, and consequently that the waste site lies within an Indian reservation where federal environmental regulations apply. The Eighth Circuit affirmed.

Held: The 1894 Act's operative language and the circumstances surrounding its passage demonstrate that Congress intended to diminish the Yankton Reservation. Pp. 797-805.

a) States acquired primary jurisdiction over unallotted opened lands if the applicable surplus land Act freed those lands of their reservation status and thereby diminished the reservation boundaries, *Solem v. Bartlett*, 465 U.S. 463, 467, 104 S.Ct. 1161, 1164, 79 L.Ed.2d 443, but the entire opened area remained Indian country if the Act simply offered non-Indians the opportunity to purchase land within established reservation boundaries, *id.*, at 470, 104 S.Ct., at 1166. The touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose, *see Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615, 97 S.Ct. 1361, 1377, 51 L.Ed.2d 660, and Congress' intent to alter an Indian treaty's terms by diminishing a reservation must be "clear and plain," *United States v. Dion*, 476 U.S. 734, 738-739, 106 S.Ct. 2216, 2219-2220, 90 L.Ed.2d 767. The most probative evidence of congressional intent is the statutory language, but the Court will also consider the historical context surrounding the Act's passage, and, to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement there. *Hagen v. Utah*, 510 U.S. 399, 411, 114 S.Ct. 958, 965, 127 L.Ed.2d 252. Ambiguities must be resolved in favor of the Indians, and the Court will not lightly find diminishment. *Ibid.* Pp. 797-798.

(b) The plain language of the 1894 Act evinces congressional intent to diminish the reservation. Article I's "cession" language

– the Tribe will "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands" – and Article II's "sum certain" language – whereby the United States pledges a fixed payment of $600,000 in return – is "precisely suited" to terminating reservation status. *See DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 445, 95 S.Ct. 1082, 1093, 43 L.Ed.2d 300. Indeed, when a surplus land Act contains both explicit cession language, evidencing "the present and total surrender of all tribal interests," and a provision for a fixed-sum payment, representing "an unconditional commitment from Congress to compensate the Indian tribe for its opened land," a "nearly conclusive," or "almost insurmountable," presumption of diminishment arises. *See Solem, supra*, at 470, 104 S.Ct., at 1166; *see also Hagen, supra*, at 411, 114 S.Ct., at 965. Pp. 798-799.

(c) The Court rejects the Tribe's argument that, because the 1894 Act's saving clause purported to conserve the 1858 Treaty, the existing reservation boundaries were maintained. Such a literal construction would eviscerate the 1892 agreement by impugning the entire sale. Rather, it seems most likely that the parties inserted Article XVIII, including both the general statement regarding the force of the 1858 Treaty and a particular provision ensuring that the "Yankton Indians shall continue to receive their annuities under [that treaty]," for the

limited purpose of assuaging the Tribe's concerns about their entitlement to annuities. Discussion of the annuities figured prominently in the negotiations that led to the 1892 agreement, but no mention was made of the preservation of the 1858 boundaries. Pp. 799-801.

d) Neither the 1894 Act's clause reserving sections of each township for schools nor its prohibition on liquor within the ceded lands supports the Tribe's position. The Court agrees with the State that the school sections clause reinforces the view that Congress intended to extinguish the reservation status of the unallotted land. *See, e.g., Rosebud, supra,* at 601, 97 S.Ct., at 1370; *but see Solem, supra,* at 474, 104 S.Ct., at 1168. Moreover, the most reasonable inference from the inclusion of the liquor prohibition is that Congress was aware that the opened, unallotted areas would henceforth not be "Indian country," where alcohol already had been banned. *Rosebud, supra,* at 613, 97 S.Ct., at 1376. Pp. 801-802.

(e) Although the Act's historical context and the area's subsequent treatment are not such compelling evidence that, standing alone, they would indicate diminishment, neither do they rebut the "almost insurmountable presumption" that arises from the statute's plain terms. The manner in which the Government negotiated the transaction with the Tribe and the tenor of the legislative reports presented to Congress

reveal a contemporaneous understanding that the 1894 Act modified the reservation. *See Solem, supra,* at 471, 104 S.Ct., at 1166. The legislative history itself adds little because Congress considered several surplus land sale agreements at the same time, but the few relevant references from the floor debates support a finding of diminishment. In addition, the Presidential Proclamation opening the lands to settlement contains language indicating that the Nation's Chief Executive viewed the reservation boundaries as altered. *See Rosebud, supra,* at 602-603, 97 S.Ct., at 1371. Pp. 802-803.

(f) Despite the apparent contemporaneous understanding that the 1894 Act diminished the reservation, in the years since, both Congress and the Executive Branch have described the reservation in contradictory terms and treated the region in an inconsistent manner. The mixed record reveals no dominant approach, and it carries but little force in light of the strong textual and contemporaneous evidence of diminishment. *E.g., Rosebud, supra,* at 605, n. 27, 97 S.Ct., at 1372-1373, n. 27. Pp. 803-804.

(g) Demographic factors also signify diminishment: The Yankton population in the region promptly and drastically declined after the 1894 Act, and the area remains predominantly populated by non-Indians with only a few surviving pockets of Indian allotments. *Solem, supra,* at 471, and n. 12, 104 S.Ct., at 1166-1167, and n. 12. The

Court's holding is further reinforced by the State's assumption of jurisdiction over the ceded territory almost immediately after the 1894 Act, and by the lack of evidence that the Tribe has attempted until recently to exercise jurisdiction over nontrust lands. 99 F.3d 1439, 1456. Finally, the Yankton Constitution, drafted in 1932 and amended in 1962, defines the Tribe's territory to include only those tribal lands within the 1858 boundaries "now owned" by the Tribe. Pp. 804-805.

(h) The conflicting understandings about the status of the reservation, together with the fact that the Tribe continues to own land in common, caution the Court to limit its holding to the narrow question presented: whether unallotted, ceded lands were severed from the reservation. The Court need not determine whether Congress disestablished the reservation altogether in order to resolve this case, and accordingly declines to do so. *See, e.g., Hagen, supra,* at 421, 114 S.Ct., at 970. P. 805.

99 F.3d 1439 (C.A.8 1996), reversed and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Mark W. Barnett, Pierre, SD, for petitioner.

James G. Abourezk, Sioux Falls, SD, for respondents.

Barbara B. McDowell, Washington, DC, for U.S. as amicus curiae, by special leave of Court.

Justice O'CONNOR delivered the opinion of the Court.

This case presents the question whether, in an 1894 statute that ratified an agreement for the sale of surplus tribal lands, Congress diminished the boundaries of the Yankton Sioux Reservation in South Dakota. The reservation was established pursuant to an 1858 Treaty between the United States and the Yankton Sioux Tribe. Subsequently, under the Indian General Allotment Act, Act of Feb. 8, 1887, 24 Stat. 388, 25 U.S.C. § 331 (Dawes Act), individual members of the Tribe received allotments of reservation land, and the Government then negotiated with the Tribe for the cession of the remaining, unallotted lands. The issue we confront illustrates the jurisdictional quandaries wrought by the allotment policy: We must decide whether a landfill constructed on non-Indian fee land that falls within the boundaries of the original Yankton Reservation remains subject to federal environmental regulations. If the divestiture of Indian property in 1894 effected a diminishment of Indian territory, then the ceded lands no longer constitute "Indian country" as defined by 18 U.S.C. § 1151(a), and the State now has primary jurisdiction over them. In light of the operative language of the 1894 Act, and the circumstances surrounding its passage, we hold that Congress intended to diminish the Yankton Reservation and consequently that the waste site is not in Indian country.

I

A

At the outset of the 19th century, the Yankton Sioux Tribe held exclusive dominion over 13 million acres of land between the Des Moines and Missouri Rivers, near the boundary that currently divides North and South Dakota. H. Hoover, The Yankton Sioux 25 (1988). In 1858, the Yanktons entered into a treaty with the United States renouncing their claim to more than 11 million acres of their aboriginal lands in the north-central plains. Treaty of Apr. 19, 1858, 11 Stat. 743. Pursuant to the agreement, the Tribe ceded

> "all the lands now owned, possessed, or claimed by them, wherever situated, except four hundred thousand acres thereof, situated and described as follows, to wit – Beginning at the mouth of the Naw-izi-wa-koo-pah or Chouteau River and extending up the Missouri River thirty miles; thence due north to a point; thence easterly to a point on the said Chouteau River; thence down said river to the place of beginning, so as to include the said quantity of four hundred thousand acres." Art. I, *id.*, at 744.

The retained portion of the Tribe's lands, located in what is now the southeastern part of Charles Mix County, South Dakota, was later surveyed and determined to encompass 430,405 acres. *See* Letter from the Commissioner of Indian Affairs to the Secretary of the Interior (Dec. 9, 1893), reprinted in S. Exec. Doc. No. 27, 53d Cong., 2d Sess., 5 (1894) (hereinafter

Letter). In consideration for the cession of lands and release of claims, the United States pledged to protect the Yankton Tribe in their "quiet and peaceable possession" of this reservation and agreed that "[n]o white person," with narrow exceptions, would "be permitted to reside or make any settlement upon any part of the [reservation]." Arts. IV, X, 11 Stat. 744, 747. The Federal Government further promised to pay the Tribe, or expend for the benefit of members of the Tribe, $1.6 million over a 50-year period, and appropriated an additional $50,000 to aid the Tribe in its transition to the reservation through the purchase of livestock and agricultural implements, and the construction of houses, schools, and other buildings.

Not all of this assistance was forthcoming, and the Tribe experienced severe financial difficulties in the years that followed, compounded by weather cycles of drought and devastating floods. When war broke out between the United States and the Sioux Nation in 1862, the Yankton Tribe alone sided with the Federal Government, a decision that isolated it from the rest of the Sioux Federation and caused severe inner turmoil as well. The Tribe's difficulties coincided with a period of rapid growth in the United States' population, increasing westward migration, and ensuing demands from non-Indians to open Indian holdings throughout the Western States to settlement.

In response to these "familiar forces," *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 431, 95 S.Ct. 1082, 1086, 43 L.Ed.2d 300

(1975), Congress retreated from the reservation concept and began to dismantle the territories that it had previously set aside as permanent and exclusive homes for Indian tribes. *See Solem v. Bartlett*, 465 U.S. 463, 466, 104 S Ct. 1161, 1163-1164, 79 L.Ed.2d 443 (1984). The pressure from westward-bound homesteaders, and the belief that the Indians would benefit from private property ownership, prompted passage of the Dawes Act in 1887, 24 Stat. 388. The Dawes Act permitted the Federal Government to allot tracts of tribal land to individual Indians and, with tribal consent, to open the remaining holdings to non-Indian settlement. Within a generation or two, it was thought, the tribes would dissolve, their reservations would disappear, and individual Indians would be absorbed into the larger community of white settlers. *See* Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 428 (1934) (statement of D.S. Otis on the history of the allotment policy). With respect to the Yankton Reservation in particular, some Members of Congress speculated that "close contact with the frugal, moral, and industrious people who will settle [on the reservation] [would] stimulate individual effort and make [the Tribe's] progress much more rapid than heretofore." Report of the Senate Committee on Indian Affairs, S.Rep. No. 196, 53d Cong., 2d Sess., 1 (1894).

In accordance with the Dawes Act, each member of the Yankton Tribe received a 160-acre tract from the existing reservation, held in trust by the United States for 25 years. Members of the Tribe acquired

parcels of land throughout the 1858 reservation, although many of the allotments were clustered in the southern part, near the Missouri River. By 1890, the allotting agent had apportioned 167,325 acres of reservation land, 95,000 additional acres were subsequently allotted under the Act of February 28, 1891, 26 Stat. 795, and a small amount of acreage was reserved for government and religious purposes. The surplus amounted to approximately 168,000 acres of unallotted lands. *See* Letter, at 5.

In 1892, the Secretary of the Interior dispatched a three-member Yankton Indian Commission to Greenwood, South Dakota, to negotiate for the acquisition of these surplus lands. *See* Act of July 13, 1892, 27 Stat. 137 (appropriating funds to enable the Secretary to "negotiate with any Indians for the surrender of portions of their respective reservations"). When the Commissioners arrived on the reservation in October 1892, they informed the Tribe that they had been sent by the "Great Father" to discuss the cession of "this land that [members of the Tribe] hold in common," Council of the Yankton Indians (Oct. 8, 1892), transcribed in S. Exec. Doc. No. 27, at 48, and they abruptly encountered opposition to the sale from traditionalist tribal leaders. *See* Report of the Yankton Indian Commission (Mar. 31, 1893), reprinted in S. Exec. Doc. No. 27, at 9-11 (hereinafter Report). In the lengthy negotiations that followed, members of the Tribe raised concerns about the suggested price per acre, the preservation of their annuities under the 1858 Treaty, and other outstanding claims against

the United States, but they did not discuss the future boundaries of the reservation. Once the Commissioners garnered a measure of support for the sale of the unallotted lands, they submitted a proposed agreement to the Tribe.[1]

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[1] The text of the agreement provides in relevant part:

"Article I

"The Yankton tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid

"Article II

"In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000), as hereinbefore provided for.

"Article VII.

"In addition to the stipulations in the preceding articles, upon the ratification of this agreement by Congress, the United States shall pay to the Yankton tribe of Sioux Indians as follows To each person whose name is signed to this agreement and to each other male member of the tribe who is eighteen years old or older at the date of this agreement, twenty dollars ($20) in one double eagle, struck in the year 1892 as a memorial of this agreement

"Article VIII.

"Such part of the surplus lands hereby ceded and sold to the United States as may now be occupied by the United States for agency, schools, and other purposes,

(Continued on following page)

shall be reserved from sale to settlers until they are no longer required for such purposes But all other lands included in this sale shall, immediately after the ratification of this agreement by Congress, be offered for sale through the proper land office, to be disposed of under the existing land laws of the United States, to actual bona fide settlers only

. . .

"Article XV

"The claim of fifty-one Yankton Sioux Indians, who were employed as scouts by General Alf Sully in 1864, for additional compensation at the rate of two hundred and twenty-five dollars ($225) each, aggregating the sum of eleven thousand four hundred and seventy-five dollars ($11,475) is hereby recognized as just, and within ninety days (90) after the ratification of this agreement by Congress the same shall be paid in lawful money of the United States to the said scouts or to their heirs

. . .

"Article XVII

"No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, and as afterwards surveyed and set off to the said Indians The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement

"Article XVIII

"Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States And after the signing of this agreement, and its ratification

(Continued on following page)

Article I of the agreement provided that the Tribe would "cede, sell, relinquish, and convey to the United States" all of the unallotted lands on the reservation. Pursuant to Article II, the United States agreed to compensate the Tribe in a single payment of $600,000, which amounted to $3.60 per acre.[2] Much of the agreement focused on the payment and disposition of that sum. Article VII further provided that all the signatories and adult male members of the Tribe would receive a $20 gold piece to commemorate the agreement. Some members of the Tribe also sought unpaid wages from their service as scouts in the Sioux War, and in Article XV, the United States recognized their claim. The saving clause in Article XVIII, the core of the current disagreement between the parties to this case, stated that nothing in the agreement's terms "shall be construed to abrogate the treaty [of 1858]" and that "all provisions of the said treaty . . . shall be in full force and effect, the same as though this agreement had not been made."

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by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858." 28 Stat. 314-318.

[2] In 1980, the Court of Claims concluded that the land ceded by the Tribe had a fair market value of $6.65 per acre, or $1,337,381.50, that the $600,000 paid pursuant to the 1892 agreement was "unconscionable and grossly inadequate," and that the Tribe was entitled to recover the difference. *Yankton Sioux Tribe v. United States*, 224 Ct. Cl. 62, 623 F.2d 159, 178

By March 1893, the Commissioners had collected signatures from 255 of the 458 male members of the Tribe eligible to vote, and thus obtained the requisite majority endorsement. The Yankton Indian Commission filed its report in May 1893, but congressional consideration was delayed by an investigation into allegations of fraud in the procurement of signatures. On August 15, 1894, Congress finally ratified the 1892 agreement, together with similar surplus land sale agreements between the United States and the Siletz and Nez Perce Tribes. Act of Aug. 15, 1894, 28 Stat. 286. The 1894 Act incorporated the 1892 agreement in its entirety and appropriated the necessary funds to compensate the Tribe for the ceded lands, to satisfy the claims for scout pay, and to award the commemorative $20 gold pieces. Congress also prescribed the punishment for violating a liquor prohibition included in the agreement and reserved certain sections in each township for common-school purposes. *Ibid.*

President Cleveland issued a proclamation opening the ceded lands to settlement as of May 21, 1895, and non-Indians rapidly acquired them. By the turn of the century, 90 percent of the unallotted tracts had been settled. *See Yankton Sioux Tribe v. United States,* 224 Ct.Cl. 62, 623 F.2d 159, 171 (1980). A majority of the individual allotments granted to members of the Tribe also were subsequently conveyed in fee by the members to non-Indians. Today, the total Indian holdings in the region consist of approximately 30,000 acres of allotted land and 6,000

acres of tribal land. Indian Reservations: A State and Federal Handbook 260 (1986).

Although formally repudiated with the passage of the Indian Reorganization Act in 1934, 48 Stat. 984, 25 U.S.C. § 461, the policy favoring assimilation of Indian tribes through the allotment of reservation land left behind a lasting legacy. The conflict between the modern-day approach to tribal self-determination and the assimilation impetus of the allotment era has engendered "a spate of jurisdictional disputes between state and federal officials as to which sovereign has authority over lands that were opened by the [surplus land] Acts and have since passed out of Indian ownership." *Solem*, 465 U.S., at 467, 104 S.Ct., at 1164.

B

We confront such a dispute in the instant case, in which tribal, federal, and state officials disagree as to the environmental regulations applicable to a proposed waste site. In February 1992, several South Dakota counties formed the Southern Missouri Recycling and Waste Management District (hereinafter Waste District) for the purpose of constructing a municipal solid waste disposal facility. The Waste District acquired the site for the landfill, which falls within the 1858 boundaries of the Yankton Sioux Reservation, in fee from a non-Indian. The predicate for the parties' claims in this case is that the waste

site lies on land ceded in the 1894 Act, and the record supports that assumption.

In the Tribe's complaint, the proposed landfill is described as "the south one-half north one-quarter (S 1/2 N 1/4) Section 6, Township 96 North, Range 65 West (S6, T96N, R65W) of the Fifth Principal Meridan *[sic]*, Charles Mix County, South Dakota." App. 24. That description corresponds to the account of a tract of land deeded to Lars K. Langeland under the Homestead Act in 1904. *See* App. to Brief for Respondent Southern Missouri Waste Management District 1a-2a. Because all of the land allotted to individual Indians on the Yankton Reservation was inalienable, pursuant to the Dawes Act, during a 25-year trust period, the tract acquired by a homesteader in 1904 and currently owned by the Waste District must consist of unallotted land ceded in the 1894 Act. (The Dawes Act was amended in 1906 by the Burke Act, 34 Stat. 182, 25 U.S.C. § 349, which permitted the issuance of some fee-simple patents before the expiration of the 25-year trust period, but the restrictions on alienation remained in place as of 1904.)

When the Waste District sought a state permit for the landfill, the Yankton Tribe intervened and objected on environmental grounds, arguing that the proposed compacted clay liner was inadequate to prevent leakage. After an administrative hearing in December 1993, the State Board of Minerals and the Environment granted the solid waste permit, finding that South Dakota regulations did not require the

installation of the synthetic composite liner the Tribe had requested. The Sixth Judicial Circuit affirmed the Board's decision, and no appeal was taken to the State Supreme Court.

In September 1994, the Tribe filed suit in the Federal District Court for the District of South Dakota to enjoin construction of the landfill, and the Waste District joined South Dakota as a third party so that the State could defend its jurisdiction to grant the permit. The Tribe also sought a declaratory judgment that the permit did not comport with Federal Environmental Protection Agency (EPA) regulations mandating the installation of a composite liner in the landfill. *See* 40 C.F.R. § 258.40(b) (1997). The District Court held, in accordance with our decision in *South Dakota v. Bourland*, 508 U.S. 679, 692, 113 S.Ct. 2309, 2318, 124 L.Ed.2d 606 (1993), that the Tribe itself could not assert regulatory jurisdiction over the non-Indian activity on fee lands. Furthermore, because the Tribe did not establish that the landfill would compromise the "political integrity, the economic security, or the health or welfare of the tribe," the court concluded that the Tribe could not invoke its inherent sovereignty under the exceptions in *Montana v. United States*, 450 U.S. 544, 566, 101 S.Ct. 1245, 1258-1259, 67 L.Ed.2d 493 (1981). Accordingly, the court declined to enjoin the landfill project, a decision the Tribe does not appeal. The District Court also determined, however, that the 1894 Act did not diminish the exterior boundaries of the reservation as delineated in the 1858 Treaty between the

United States and the Tribe, and consequently that the waste site lies within an Indian reservation where federal environmental regulations apply.

On appeal by the State,[3] a divided panel of the Court of Appeals for the Eighth Circuit agreed that "Congress intended by its 1894 Act that the Yankton Sioux sell their surplus land to the government, but not their governmental authority over it." 99 F.3d 1439, 1457 (1996). The court relied primarily on the saving clause in Article XVIII, reasoning that, given its "unusually expansive language," other sections of the 1894 Act "should be read narrowly to minimize any conflict with the 1858 treaty." *Id.*, at 1447. The court further concluded that neither the historical evidence nor the demographic development of the area could sustain a finding of diminishment. *Id.*, at 1457.

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[3] The Waste District explains that it did not appeal because the District Court's decision allowed it to go forward with construction of the proposed landfill, but it filed a brief as a respondent supporting the petitioner State in this Court because "of the likelihood that the assertion of tribal jurisdiction will continue to affect the District in this or similar contexts." Brief for Respondent Southern Missouri Waste Management District 6, n. 6. With respect to the particular issue of the landfill's liner, the Waste District's concerns appear academic. The EPA has waived the requirement of a composite liner and has permitted construction to go forward with the compacted clay liner. *See Yankton Sioux Tribe v. Environmental Protection Agency*, 950 F.Supp. 1471, 1482 (D.S.D. 1996).

We granted certiorari to resolve a conflict between the decision of the Court of Appeals and a number of decisions of the South Dakota Supreme Court declaring that the reservation has been diminished.[4] 520 U.S. 1263, 117 S.Ct. 2430, 138 L.Ed.2d 192 (1997). We now reverse the Eighth Circuit's decision and hold that the unallotted lands ceded as a result of the 1894 Act did not retain reservation status.

II

States acquired primary jurisdiction over unallotted opened lands where "the applicable surplus land Act freed that land of its reservation status and thereby diminished the reservation boundaries." *Solem*, 465 U.S., at 467, 104 S.Ct., at 1164. In contrast, if a surplus land Act "simply offered non-Indians the opportunity to purchase land within established reservation boundaries," *id.*, at 470, 104 S.Ct., at 1166, then the entire opened area remained Indian country. Our touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615, 97 S.Ct. 1361, 1377, 51 L.Ed.2d 660 (1977). Congress possesses plenary power over Indian affairs, including the power

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[4] *See State v. Greger*, 559 N.W.2d 854 (S.D. 1997), *see also State v. Thompson*, 355 N.W.2d 349, 350 (S.D. 1984), *State v. Williamson*, 87 S.D. 512, 515, 211 N.W.2d 182, 184 (1973), *Wood v. Jameson*, 81 S.D. 12, 18-19, 130 N.W.2d 95, 99 (1964).

to modify or eliminate tribal rights. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978). Accordingly, only Congress can alter the terms of an Indian treaty by diminishing a reservation, *United States v. Celestine*, 215 U.S. 278, 285, 30 S.Ct. 93, 94-95, 54 L.Ed. 195 (1909), and its intent to do so must be "clear and plain," *United States v. Dion*, 476 U.S. 734, 738-739, 106 S.Ct. 2216, 2219-2220, 90 L.Ed.2d 767 (1986).

Here, we must determine whether Congress intended by the 1894 Act to modify the reservation set aside for the Yankton Tribe in the 1858 Treaty. Our inquiry is informed by the understanding that, at the turn of this century, Congress did not view the distinction between acquiring Indian property and assuming jurisdiction over Indian territory as a critical one, in part because "[t]he notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar," *Solem*, 465 U.S., at 468, 104 S.Ct., at 1164, and in part because Congress then assumed that the reservation system would fade over time. "Given this expectation, Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation." *Ibid.*; *see also Hagen*, 510 U.S. 399, 426, 114 S.Ct. 958, 973, 127 L.Ed.2d 252 (1994). (Blackmun, J., dissenting) ("As a result of the patina history has placed on the allotment Acts, the Court is presented with questions that their architects could not have foreseen"). Thus, although "[t]he most probative

evidence of diminishment is, of course, the statutory language used to open the Indian lands," we have held that we will also consider "the historical context surrounding the passage of the surplus land Acts," and, to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement there. *Id.*, at 411, 114 S.Ct., at 965. Throughout this inquiry, "we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment." *Ibid.*

A

Article I of the 1894 Act provides that the Tribe will "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation"; pursuant to Article II, the United States pledges a fixed payment of $600,000 in return. This "cession" and "sum certain" language is "precisely suited" to terminating reservation status. *See DeCoteau*, 420 U.S., at 445, 95 S.Ct., at 1093. Indeed, we have held that when a surplus land Act contains both explicit language of cession, evidencing "the present and total surrender of all tribal interests," and a provision for a fixed-sum payment, representing "an unconditional commitment from Congress to compensate the Indian tribe for its opened land," a "nearly conclusive," or "almost insurmountable," presumption of diminishment arises. *Solem, supra*, at 470, 104 S.Ct., at 1166; *see also Hagen, supra*, at 411, 114 S.Ct., at 965.

The terms of the 1894 Act parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau, supra,* at 445, 95 S.Ct., at 1093, and, as in *DeCoteau*, the 1894 Act ratified a negotiated agreement supported by a majority of the Tribe. Moreover, the Act we construe here more clearly indicates diminishment than did the surplus land Act at issue in *Hagen*, which we concluded diminished reservation lands even though it provided only that "all the unallotted lands within said reservation shall be restored to the public domain." *See* 510 U.S., at 412, 114 S.Ct., at 966.

The 1894 Act is also readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries. In both *Seymour v. Superintendent of Wash. State Penitentiary,* 368 U.S. 351, 355, 82 S.Ct. 424, 426-427, 7 L.Ed.2d 346 (1962), and *Mattz v. Arnett,* 412 U.S. 481, 501-502, 93 S.Ct. 2245, 2256-2257, 37 L.Ed.2d 92 (1973), we held that Acts declaring surplus land "subject to settlement, entry, and purchase," without more, did not evince congressional intent to diminish the reservations. Likewise, in *Solem,* we did not read a phrase authorizing the Secretary of the Interior to "sell and dispose" of surplus lands belonging to the Cheyenne River Sioux as language of cession. *See* 465 U.S., at 472, 104 S.Ct., at 1167. In contrast, the 1894 Act at issue here – a negotiated agreement providing for the total surrender of tribal claims in exchange for a fixed payment – bears the hallmarks of congressional intent to diminish a reservation.

B

The Yankton Tribe and the United States, appearing as *amicus* for the Tribe, rest their argument against diminishment primarily on the saving clause in Article XVIII of the 1894 Act. The Tribe asserts that because that clause purported to conserve the provisions of the 1858 Treaty, the existing reservation boundaries were maintained. The United States urges a similarly "holistic" construction of the agreement, which would presume that the parties intended to modify the 1858 Treaty only insofar as necessary to open the surplus lands for settlement, without fundamentally altering the treaty's terms.

Such a literal construction of the saving clause, as the South Dakota Supreme Court noted in *State v. Greger*, 559 N.W.2d 854, 863 (1997), would "impugn the entire sale." The unconditional relinquishment of the Tribe's territory for settlement by non-Indian homesteaders can by no means be reconciled with the central provisions of the 1858 Treaty, which recognized the reservation as the Tribe's "permanent" home and prohibited white settlement there. *See Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753, 770, 105 S.Ct. 3420, 3430, 87 L.Ed.2d 542 (1985) (discounting a saving clause on the basis of a "glaring inconsistency" between the original treaty and the subsequent agreement). Moreover, the Government's contention that the Tribe intended to cede some property but maintain the entire reservation as its territory contradicts the common understanding of the time: that tribal ownership was a

critical component of reservation status. *See Solem, supra,* at 468, 104 S.Ct., at 1164-1165. We "cannot ignore plain language that, viewed in historical context and given a fair appraisal, clearly runs counter to a tribe's later claims." *Klamath, supra,* at 774, 105 S.Ct., at 3432 (internal quotation marks and citation omitted).

Rather than read the saving clause in a manner that eviscerates the agreement in which it appears, we give it a "sensible construction" that avoids this "absurd conclusion." *See United States v. Granderson,* 511 U.S. 39, 56, 114 S.Ct. 1259, 1268-1269, 127 L.Ed.2d 611 (1994) (internal quotation marks omitted). The most plausible interpretation of Article XVIII revolves around the annuities in the form of cash, guns, ammunition, food, and clothing that the Tribe was to receive in exchange for its aboriginal claims for 50 years after the 1858 Treaty. Along with the proposed sale price, these annuities and other unrealized Yankton claims dominated the 1892 negotiations between the Commissioners and the Tribe. The tribal historian testified, before the District Court, that the loss of their rations would have been "disastrous" to the Tribe, App. 589, and members of the Tribe clearly perceived a threat to the annuities. At a particularly tense point in the negotiations, when the tide seemed to turn in favor of forces opposing the sale, Commissioner John J. Cole warned:

> "I want you to understand that you are absolutely dependent upon the Great Father

> today for a living. Let the Government send out instructions to your agent to cease to issue these rations, let the Government instruct your agent to cease to issue your clothes. . . . Let the Government instruct him to cease to issue your supplies, let him take away the money to run your schools with, and I want to know what you would do. Everything you are wearing and eating is gratuity. Take all this away and throw this people wholly upon their own responsibility to take care of themselves, and what would be the result? Not one-fourth of your people could live through the winter, and when the grass grows again it would be nourished by the dust of all the balance of your noble tribe." Council of the Yankton Indians (Dec. 10, 1892), transcribed in S. Exec. Doc. No. 27, at 74.

Given the Tribe's evident concern with reaffirmance of the Government's obligations under the 1858 Treaty, and the Commissioners' tendency to wield the payments as an inducement to sign the agreement, we conclude that the saving clause pertains to the continuance of annuities, not the 1858 borders.

The language in Article XVIII specifically ensuring that the "Yankton Indians shall continue to receive their annuities under the [1858 Treaty]" underscores the limited purpose and scope of the saving clause. It is true that the Court avoids interpreting statutes in a way that "renders some words altogether redundant." *Gustafson v. Alloyd Co.*, 513

U.S. 561, 574, 115 S.Ct. 1061, 1069, 131 L.Ed.2d 1 (1995). But in light of the fact that the record of the negotiations between the Commissioners and the Yankton Tribe contains no discussion of the preservation of the 1858 boundaries but many references to the Government's failure to fulfill earlier promises, *see, e.g.*, Council of the Yankton Indians (Dec. 3, 1892), transcribed in S. Exec. Doc. No. 27, at 54-55, it seems most likely that the parties inserted and understood Article XVIII, including both the general statement regarding the force of the 1858 Treaty and the particular provision that payments would continue as specified therein, to assuage the Tribes' concerns about their past claims and future entitlements.

Indeed, apart from the pledge to pay annuities, it is hard to identify any provision in the 1858 Treaty that the Tribe might have sought to preserve, other than those plainly inconsistent with or expressly included in the 1894 Act. The Government points to Article XI of the treaty, in which the Tribe agreed to submit for federal resolution "all matters of dispute and difficulty between themselves and other Indians," 11 Stat. 747, and urges us to extrapolate from this provision that the Tribe implicitly retained jurisdiction over internal matters, and from there to apply the standard canon of Indian law that "[o]nce powers of tribal self-government or other Indian rights are shown to exist, by treaty or otherwise, later federal action which might arguably abridge them is construed narrowly in favor of retaining Indian rights."

F. Cohen, Handbook of Federal Indian Law 224 (1982) (hereinafter Cohen). But the treaty's reference to tribal authority is indirect, at best, and it does not persuade us to view the saving clause as an agreement to maintain exclusive tribal governance within the original reservation boundaries.

The Tribe further contends that because Article XVIII affirms that the 1858 Treaty will govern "the same as though [the 1892 agreement] had not been made," without reference to consistency between those agreements, it has more force than the standard saving clause. While the language of the saving clause is indeed unusual, we do not think it is meaningfully distinct from the saving clauses that have failed to move this Court to find that pre-existing treaties remain in effect under comparable circumstances. *See, e.g., Klamath,* 473 U.S., at 769-770, 105 S.Ct., at 3429-3430; *Montana,* 450 U.S., at 548, 558-559, 101 S.Ct., at 1254-1255 ; *Rosebud,* 430 U.S., at 623, 97 S.Ct., at 1381 (Marshall, J., dissenting). Furthermore, "it is a commonplace of statutory construction that the specific" cession and sum certain language in Articles I and II "governs the general" terms of the saving clause. *See Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 384, 112 S.Ct. 2031, 2037, 119 L.Ed.2d 157 (1992).

Finally, the Tribe argues that, at a minimum, the saving clause renders the statute equivocal, and that confronted with that ambiguity we must adopt the reading that favors the Tribe. See *Carpenter v. Shaw,* 280 U.S. 363, 367, 50 S.Ct. 121, 122-123, 74 L.Ed. 478

(1930). The principle according to which ambiguities are resolved to the benefit of Indian tribes is not, however, "a license to disregard clear expressions of tribal and congressional intent." *DeCoteau,* 420 U.S., at 447, 95 S.Ct., at 1094; *see also South Carolina v. Catawba Tribe, Inc.,* 476 U.S. 498, 506, 106 S.Ct. 2039, 2044, 90 L.Ed.2d 490 (1986). In previous decisions, this Court has recognized that the precise cession and sum certain language contained in the 1894 Act plainly indicates diminishment, and a reasonable interpretation of the saving clause does not conflict with a like conclusion in this case.

C

Both the State and the Tribe seek support for their respective positions in two other provisions of the 1894 Act: a clause reserving sections of each township for schools and a prohibition on liquor within the ceded lands. Upon ratification, Congress added that "the sixteenth and thirty-sixth sections in each Congressional township . . . shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota." 28 Stat. 319. This "school sections clause" parallels the enabling Act admitting South Dakota to the Union, which grants the State sections 16 and 36 in every township for the support of common schools, but expressly exempts reservation land "until the reservation shall have been extinguished and such lands restored to . . . the public domain." Act of Feb. 22, 1889, 25 Stat. 679. When considering a similar provision included in the Act

ceding the Rosebud Sioux Reservation in South Dakota, the Court discerned congressional intent to diminish the reservation, "thereby making the sections available for disposition to the State of South Dakota for 'school sections.'" *Rosebud, supra,* at 601, 97 S.Ct., at 1370. The Tribe argues that the clause in the 1894 Act specifying the application of state law would be superfluous if Congress intended to diminish the reservation. As the Court stated in *DeCoteau,* however, "the natural inference would be that state law is to govern the manner in which the 16th and 36th sections are to be employed 'for common school purposes,'" which "implies nothing about the presence or absence of state civil and criminal jurisdiction over the remainder of the ceded lands." 420 U.S., at 446, n. 33, 95 S.Ct., at 1094, n. 33.

Although we agree with the State that the school sections clause reinforces the view that Congress intended to extinguish the reservation status of the unallotted land, a somewhat contradictory provision counsels against finding the reservation terminated. Article VIII of the 1894 Act reserved from sale those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes." In *Solem,* the Court noted with respect to virtually identical language that "[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation." 465 U.S., at 474, 104 S.Ct., at 1168.

The State's position is more persuasively supported by the liquor prohibition included in Article XVII of the agreement. The provision prohibits the sale or offering of "intoxicating liquors" on "any of the lands by this agreement ceded and sold to the United States" or "any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the [1858] treaty," 28 Stat. 318, thus signaling a jurisdictional distinction between reservation and ceded land. The Commissioners' report recommends that Congress "fix a penalty for the violation of this provision which will make it most effective in preventing the introduction of intoxicants within the limits of the reservation," Report, at 21, which could be read to suggest that ceded lands remained part of the reservation. We conclude, however, that "the most reasonable inference from the inclusion of this provision is that Congress was aware that the opened, unallotted areas would henceforth not be 'Indian country.'" *Rosebud, supra,* at 613, 97 S.Ct., at 1376. By 1892, Congress already had enacted laws prohibiting alcohol on Indian reservations, *see* Cohen 306-307, and "[w]e assume that Congress is aware of existing law when it passes legislation," *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 317, 325, 112 L.Ed.2d 275 (1990). Furthermore, the Commissioner of Indian Affairs described the provision as prohibiting "the sale or disposition of intoxicants upon any of the lands *now* within the Yankton Reservation," Letter, at 6-7 (emphasis added), indicating that the lands would be severed from the reservation upon ratification of the

agreement. In *Perrin v. United States*, 232 U.S. 478, 34 S.Ct. 387, 58 L.Ed. 691 (1914), we implied that the lands conveyed by the 1894 Act lost their reservation status when we construed Article XVII as applying to "ceded lands formerly included in the Yankton Sioux Indian Reservation." *Id.*, at 480, 34 S.Ct., at 388. We now reaffirm that the terms of the 1894 Act, including both the explicit language of cession and the surrounding provisions, attest to Congress' intent to diminish the Yankton Reservation.

III

Although we perceive congressional intent to diminish the reservation in the plain statutory language, we also take note of the contemporary historical context, subsequent congressional and administrative references to the reservation, and demographic trends. Even in the absence of a clear expression of congressional purpose in the text of a surplus land Act, unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished. *See Solem*, 465 U.S., at 471, 104 S.Ct., at 1166-1167. In this case, although the context of the Act is not so compelling that, standing alone, it would indicate diminishment, neither does it rebut the "almost insurmountable presumption" that arises from the statute's plain terms. *Id.*, at 470, 104 S.Ct., at 1166.

A

The "manner in which the transaction was negotiated" with the Yankton Tribe and "the tenor of legislative Reports presented to Congress" reveal a contemporaneous understanding that the proposed legislation modified the reservation. *Id.*, at 471, 104 S.Ct., at 1166. In 1892, when the Commissioner of Indian Affairs appointed the Yankton Commission, he charged its members to "negotiate with the [Tribe] for the cession of their surplus lands" and noted that the funds exchanged for the "relinquishment" of those lands would provide a future income for the Tribe. Instructions to the Yankton Indian Commission (July 27, 1892), reprinted in App. 98-99. The negotiations themselves confirm the understanding that by surrendering its interest in the unallotted lands, the Tribe would alter the reservation's character. Commissioner J.C. Adams informed members of the Tribe that once surplus lands were sold to the "Great Father," the Tribe would "assist in making the laws which will govern [members of the Tribe] as citizens of the State and nation." Council of the Yankton Indians (Oct. 8, 1892), transcribed in S. Exec. Doc. No. 27, at 48. In terms that strongly suggest a reconception of the reservation, Commissioner Cole admonished the Tribe:

> "This reservation alone proclaims the old time and the old conditions . . . The tide of civilization is as resistless as the tide of the ocean, and you have no choice but to accept it and live according to its methods or be

> destroyed by it. To accept it requires the sale of these surplus lands and the opening of this reservation to white settlement.
>
> "You were a great and powerful people when your abilities and energies were directed in harmony with the conditions which surrounded you, but the wave of civilization which swept over you found you unprepared for the new conditions and you became weak. . . . [Y]ou must accept the new life wholly. You must break down the barriers and invite the white man with all the elements of civilization, that your young men may have the same opportunities under the new conditions that your fathers had under the old." Council of the Yankton Indians (Dec. 17, 1892), transcribed *id.*, at 81.

Cole's vivid language and entreaty to "break down the barriers" are reminiscent of the "picturesque" statement that Congress would "pull up the nails" holding down the outside boundary of the Uintah Reservation, which we viewed as evidence of diminishment in *Hagen*, 510 U.S., at 417, 114 S.Ct., at 968-969.

Moreover, the Commissioners' report of the negotiations signaled their understanding that the cession of the surplus lands dissolved tribal governance of the 1858 reservation. They observed that "now that [members of the Tribe] have been allotted their lands in severalty and have sold their surplus land – the last property bond which assisted to hold them together in their tribal interest and estate – their tribal interests may be considered a thing of the

past." Report, at 19. And, in a March 1894 letter to the Chairman of the Senate Committee on Indian Affairs, several Yankton chiefs and members of the Tribe indicated that they concurred in such an interpretation of the agreement's impact. The letter urged congressional ratification of the agreement, explaining that the signatories "want[ed] the laws of the United States and the State that we live in to be recognized and observed," and that they did not view it as desirable to "keep up the tribal relation . . . as the tribal relation on this reservation is an obstacle and hindrance to the advancement of civilization." S. Misc. Doc. No. 134, 53d Cong., 2d Sess., 1 (1894).

The legislative history itself adds little because Congress considered the Siletz, Nez Perce, and Yankton surplus land sale agreements at the same time, but the few relevant references from the floor debates support a finding of diminishment. Some members noted that the cessions would restore the surplus lands to the "public domain," *see* 53 Cong. Rec. 6425 (1894) (remarks of Rep. McCrae); *id.*, at 6426 (remarks of Rep. Hermann), language that indicates congressional intent to diminish a reservation, *see Hagen*, *supra*, at 418, 114 S.Ct., at 969; *Solem*, 465 U.S., at 475, 104 S.Ct., at 1168-1169. That same phrase appears in the annual report of the Commissioner on Indian Affairs that was released in September 1894, just after congressional ratification of the agreement. *See* Annual Report of the Commissioner on Indian Affairs 26 (Sept. 14, 1894), excerpted in App. 450-452 (noting that under the Siletz, Nez

Perce, and Yankton agreements, "some 880,000 acres of land will be restored to the public domain").

Finally, the Presidential Proclamation opening the lands to settlement declared that the Tribe had "ceded, sold, relinquished, and conveyed to the United States, all [its] claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said tribe by the first article [of the 1858 Treaty]." Presidential Proclamation (May 16, 1895), reprinted in App. 453. This Court has described substantially similar language as "an unambiguous, contemporaneous, statement by the Nation's Chief Executive, of a perceived disestablishment." *Rosebud,* 430 U.S., at 602-603, 97 S.Ct., at 1371.

B

Despite the apparent contemporaneous understanding that the 1894 Act diminished the reservation, in the years since, both Congress and the Executive Branch have described the reservation in contradictory terms and treated the region in an inconsistent manner. An 1896 statute, for example, refers to "homestead settlers upon the Yankton Indian Reservation," 29 Stat. 16, while in a Report included in the legislative history for that statute, the Commissioner of Indian Affairs discusses the "former" reservation, H.R.Rep. No. 100, 54th Cong., 1st Sess., 2 (1896). From the 1896 statutory reference to hearings on the Indian Gaming Regulatory Act nearly a

century later, Congress has occasionally, though not invariably, referred to the "Yankton Sioux Reservation."[5] We have often observed, however, that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 348-349, 83 S.Ct. 1715, 1733, 10 L.Ed.2d 915 (1963). Likewise, the scores of administrative documents and maps marshaled by the parties to support or contradict diminishment have limited interpretive value.[6] We need not linger over whether the many

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[5] Hearings on Pub.L. 100-497, The Indian Gaming Regulatory Act of 1988, before the Subcommittee on Native American Affairs of the House Committee on Natural Resources, 103d Cong., 2d Sess., 1 (1994) (held, according to the record, at the Fort Randall Casino Hotel on the "Yankton Sioux Reservation"); *see, e.g.*, 143 Cong. Rec. S9616 (Sept. 18, 1997) (discussion of the Marty Indian School "located on the Yankton Sioux Reservation"); 135 Cong. Rec. 1656 (1989) (description of the Lake Andes-Wagner project, which irrigates "Indian-owned land located on the Yankton Sioux Reservation") *But see* 35 Stat. 808 (referring to land "on the former Yankton Reservation")

[6] *See, e.g.*, Exec. Order No. 5173 (Aug. 9, 1929) (extending the trust period on the allotted lands "on the Yankton Sioux Reservation"), Exec. Order No. 2363 (Apr. 30, 1916) (same); Letter to Chairman, Committee on Indian Affairs, from Secretary of the Interior (Feb. 1, 1921), reprinted in App. 480 (stating that "Lake Andes is within the former Yankton-Sioux Indian Reservation"); Letter to Yankton Agency from the Commissioner of Indian Affairs (Aug. 20, 1930), reprinted in App. 481 (discussing lands "heretofore constituting a part of the reservation"), Bureau of the Census, U.S. Dept. of Commerce, Pub. No. 1990 CPH-1-43, p. 175 (1991), reprinted in App. 527 (listing population figures for the Yankton Reservation).

(Continued on following page)

references to the Yankton Reservation in legislative and administrative materials utilized a convenient geographical description or reflected a considered jurisdictional statement. The mixed record we are presented with "reveals no consistent, or even dominant, approach to the territory in question," and it "carries but little force" in light of the strong textual and contemporaneous evidence of diminishment. *Rosebud, supra,* at 605, n. 27, 97 S.Ct., at 1373, n. 27; *see also Solem,* 465 U.S., at 478, 104 S.Ct., at 1170 (finding subsequent treatment that was "rife with contradictions and inconsistencies" to be "of no help to either side").

The Tribe also highlights a 1941 opinion letter issued by Felix Cohen, then-acting Solicitor of the Department of the Interior, in which he concluded that the Yankton Reservation had not been altered by the 1894 Act because allotments were "scattered over all the reservation," and the Act was thus distinguishable from statutes that "ceded a definite part of the reservation and treated the remaining areas as a diminished reservation." *See* Letter of Aug. 7, 1941, reprinted in 1 U.S. Dept. of Interior, Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1063, 1064 (1979). The letter has not been disavowed but was apparently ignored in subsequent determinations by the agency. A 1969 memorandum on tribal courts, for example, plainly stated that the 1894 Act "diminish[ed] the area over which the [Yankton] tribe might exercise its authority." Memorandum M-36783 from Associate Solicitor, Indian Affairs, to Commissioner of Indian Affairs 1 (Sept. 10, 1969), reprinted in App. 518.

C

"Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto,* if not *de jure,* diminishment may have occurred." *Id.,* at 471, 104 S.Ct., at 1166. This final consideration is the least compelling for a simple reason: Every surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the "Indian character" of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation. *See id.,* at 468-469, 104 S.Ct., at 1164-1164. The fact that the Yankton population in the region promptly and drastically declined after the 1894 Act does, however, provide "one additional clue as to what Congress expected," *id.,* at 472, 104 S.Ct., at 1167. Today, fewer than 10 percent of the 1858 reservation lands are in Indian hands, non-Indians constitute over two-thirds of the population within the 1858 boundaries, and several municipalities inside those boundaries have been incorporated under South Dakota law. The opening of the tribal casino in 1991 apparently reversed the population trend; the tribal presence in the area has steadily increased in recent years, and the advent of gaming has stimulated the local economy. In addition, some acreage within the 1858 boundaries has reverted to tribal or trust land. *See* H. Hoover, Yankton Sioux Tribal Land History (1995), reprinted in App. 545-546. Nonetheless, the area remains "predominantly populated by non-Indians with only a few

surviving pockets of Indian allotments," and those demographics signify a diminished reservation. *Solem, supra,* at 471, n. 12, 104 S.Ct., at 1167, n. 12.

The State's assumption of jurisdiction over the territory, almost immediately after the 1894 Act and continuing virtually unchallenged to the present day, further reinforces our holding. As the Court of Appeals acknowledged, South Dakota "has quite consistently exercised various forms of governmental authority over the opened lands," 99 F.3d, at 1455, and the "tribe presented no evidence that it has attempted until recently to exercise civil, regulatory, or criminal jurisdiction over nontrust lands." *Id.*, at 1456. Finally, the Yankton Constitution, drafted in 1932 and amended in 1962, defines the Tribe's territory to include only those tribal lands within the 1858 boundaries "now owned" by the Tribe. Constitution and Bylaws of the Yankton Sioux Tribal Business and Claims Committee, Art. VI, § 1.

IV

The allotment era has long since ended, and its guiding philosophy has been repudiated. Tribal communities struggled but endured, preserved their cultural roots, and remained, for the most part, near their historic lands. But despite the present-day understanding of a "government-to-government relationship between the United States and each Indian tribe," *see, e.g.,* 25 U.S.C. § 3601, we must give effect to Congress' intent in passing the 1894 Act. Here, as

in *DeCoteau,* we believe that Congress spoke clearly, and although "[s]ome might wish [it] had spoken differently, . . . we cannot remake history." 420 U.S., at 449, 95 S.Ct., at 1095.

The 1894 Act contains the most certain statutory language, evincing Congress' intent to diminish the Yankton Sioux Reservation by providing for total cession and fixed compensation. Contemporaneous historical evidence supports that conclusion, and nothing in the ambiguous subsequent treatment of the region substantially controverts our reasoning. The conflicting understandings about the status of the reservation, together with the fact that the Tribe continues to own land in common, caution us, however, to limit our holding to the narrow question presented: whether unallotted, ceded lands were severed from the reservation. We need not determine whether Congress disestablished the reservation altogether in order to resolve this case, and accordingly decline to do so. Our holding in *Hagen* was similarly limited, as was the State Supreme Court's description of the Yankton reservation in *Greger. See* 510 U.S., at 421, 114 S.Ct., at 970; *State v. Greger,* 559 N.W.2d, at 867.

* * *

In sum, we hold that Congress diminished the Yankton Sioux Reservation in the 1894 Act, that the unallotted tracts no longer constitute Indian country, and thus that the State has primary jurisdiction over the waste site and other lands ceded under the Act.

Accordingly, we reverse the judgment of the Court of Appeals for the Eighth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 08-1441

Yankton Sioux Tribe, and its individual members and United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe

Appellees

v.

Scott J. Podhradsky, State's Attorney of Charles Mix County, et al.

Appellants

- - - - - - - - - - - - - - - - - - - -

Bennett County, South Dakota

Amicus on Behalf of Appellant

Rosebud Sioux Tribe

Amicus on Behalf of Appellee

Charles Mix Electric Association, Inc., et al.

Amici on behalf of Appellant

No: 08-1488

Yankton Sioux Tribe, and its individual members

Appellant

United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe

Appellee

v.

Scott J. Podhradsky, State's Attorney of Charles Mix County, et al.

Appellees

- - - - - - - - - - - - - - - - - - - -

Bennett County, South Dakota, et al.

Amici on Behalf of Appellee

Appeal from U.S. District Court for the
District of South Dakota – Sioux Falls
(4:98-cv-04042-LLP)
(4:98-cv-04042-LLP)

ORDER

The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied. Judge Wollman did not participate in the consideration or decision of this matter.

September 20, 2010

Order Entered at the Direction
of the Court:
Clerk, U.S. Court of Appeals,
Eighth Circuit.

/s/ Michael E. Gans

[SEAL] SUPREME COURT
OF THE UNITED STATES

No. 10A592

Title:	M. Michael Rounds, Governor of South Dakota, et al., Applicants v. Yankton Sioux Tribe, et al.
Docketed:	
Lower Ct:	United States Court of Appeals for the Eighth Circuit
Case Nos.:	(08-1441, 08-1488)

~~Date~~~	~~~~Proceedings and Orders~~~~~~~~~~
Dec 3 2010	Application (190A592) to extend the time to file a petition for a writ of certiorari from December 19, 2010 to February 17, 2011, submitted to Justice Alito
Dec 14 2010	Application (10A592) granted by Justice Alito extending the time to file until January 18, 2011.

~~Name~~~~	~~~~Address~~~~~~~	~~Phone~~~~
Attorneys for Petitioners:		
John P. Guhin	Assistant Attorney General 1302 East Highway 14 Suite 1 Pierre, SD 57501-5070	(605) 773-3215

Party name: M. Michael Rounds, Governor of South Dakota, et al.

TREATY WITH THE YANKTON SIOUX, 1858

Articles of agreement and convention made and concluded at the city of Washington, this nineteenth day of April, A.D. one thousand eight hundred and fifty-eight, by Charles E. Mix, commissioner on the part of the United States, and the following-named chiefs and delegates of the Yancton tribe of Sioux or Dacotah Indians, viz:

Pa-la-ne-a-pa-pe, the man that was struck by the Ree.
Ma-to-sa-be-che-a, the smutty bear.
Charles F. Picotte, Eta-ke-cha.
Ta-ton-ka-wete-co, the crazy bull.
Pse-cha-wa-kea, the jumping thunder.
Ma-ra-ha-ton, the iron horn.
Mombe-kah-pah, one that knocks down two.
Ta-ton-ka-e-yah-ka, the fast bull.
A-ha-ka-ma-ne, the walking elk.
A-ha-ka-na-zhe, the standing elk.
A-ha-ka-ho-che-cha, the elk with a bad voice.
Cha-ton-wo-ka-pa, the grabbing hawk.
E-ha-we-cha-sha, the owl man.
Pla-son-wa-kan-na-ge, the white medicine cow that stands.
Ma-ga-scha-che-ka, the little white swan.
Oke-che-la-wash-ta, the pretty boy.

(The three last names signed by their duly-authorized agent and representative, Charles F. Picotte,) they being thereto duly authorized and empowered by said tribe of Indians.

ARTICLE 1.

The said chiefs and delegates of said tribe of Indians do hereby cede and relinquish to the United States all the lands now owned, possessed, or claimed by them, wherever situated, except four hundred thousand acres thereof, situated and described as follows, to wit – Beginning at the mouth of the Nawizi-wa-koo-pah or Chouteau River and extending up the Missouri River thirty miles; thence due north to a point; thence easterly to a point on the said Chouteau River; thence down said river to the place of beginning, so as to include the said quantity of four hundred thousand acres. They, also, hereby relinquish and abandon all claims and complaints about or growing out of any and all treaties heretofore made by them or other Indians, except their annuity rights under the treaty of Laramie, of September 17, A.D. 1851.

ARTICLE 2.

The land so ceded and relinquished by the said chiefs and delegates of the said tribe of Yanctons is and shall be known and described as follows, to wit –

"Beginning at the mouth of the Tchan-kas-andata or Calumet or Big Sioux River; thence up the Missouri River to the mouth of the Pa-hah-wa-kan or East Medicine Knoll River; thence up said river to its head; thence in a direction to the head of the main fork of the Wan-dush-kah-for or Snake River; thence down said river to its junction with the Tchan-san-san

or Jaques or James River; thence in a direct line to the northern point of Lake Kampeska; thence along the northern shore of said lake and its outlet to the junction of said outlet with the said Big Sioux River; thence down the Big Sioux River to its junction with the Missouri River."

And they also cede and relinquish to the United States all their right and title to and in all the islands of the Missouri River, from the mouth of the Big Sioux to the mouth of the Medicine Knoll River.

And the said chiefs and delegates hereby stipulate and agree that all the lands embraced in said limits are their own, and that they have full and exclusive right to cede and relinquish the same to the United States.

ARTICLE 3.

The said chiefs and delegates hereby further stipulate and agree that the United States may construct and use such roads as may be hereafter necessary across their said reservation by the consent and permission of the Secretary of the Interior, and by first paying the said Indians all damages and the fair value of the land so used for said road or roads, which said damages and value shall be determined in such manner as the Secretary of the Interior may direct. And the said Yanctons hereby agree to remove and settle and reside on said reservation within one year from this date, and, until they do so remove, (if within said year,) the United States guarantee them

in the quiet and undisturbed possession of their present settlements.

ARTICLE 4.

In consideration of the foregoing cession, relinquishment, and agreements, the United States do hereby agree and stipulate as follows, to wit:

1st. To protect the said Yanctons in the quiet and peaceable possession of the said tract of four hundred thousand acres of land so reserved for their future home, and also their persons and property thereon during good behavior on their part.

2d. To pay to them, or expend for their benefit, the sum of sixty-five thousand dollars per annum, for ten years, commencing with the year in which they shall remove to, and settle and reside upon, their said reservation – forty thousand dollars per annum for and during ten years thereafter – twenty-five thousand dollars per annum for and during ten years thereafter – and fifteen thousand dollars per annum for and during twenty years thereafter; making one million and six hundred thousand dollars in annuities in the period of fifty years, of which sums the President of the United States shall, from time to time, determine what proportion shall be paid to said Indians, in cash, and what proportion shall be expended for their benefit, and, also, in what manner and for what objects such expenditure shall be made, due regard being had in making such determination to the best interests of said Indians. He shall likewise

exercise the power to make such provision out of said sums as he may deem to be necessary and proper for the support and comfort of the aged or infirm, and helpless orphans of the said Indians. In case of any material decrease of said Indians, in number, the said amounts may, in the discretion of the President of the United States, be diminished and reduced in proportion thereto – or they may, at the discretion of the President of the United States, be discontinued entirely, should said Indians fail to make reasonable and satisfactory efforts to advance and improve their condition, in which case, such other provisions shall be made for them as the President and Congress may judge to be suitable and proper.

3d. In addition to the foregoing sum of one million and six hundred thousand dollars as annuities, to be paid to or expended for the benefit of said Indians, during the period of fifty years, as before stated, the United States hereby stipulate and agree to expend for their benefit the sum of fifty thousand dollars more, as follows, to wit: Twenty-five thousand dollars in maintaining and subsisting the said Indians during the first year after their removal to and permanent settlement upon their said reservation; in the purchase of stock, agricultural implements, or other articles of a beneficial character, and in breaking up and fencing land; in the erection of houses, storehouses, or other needful buildings, or in making such other improvements as may be necessary for their comfort and welfare.

4th. To expend ten thousand dollars to build a school-house or school-houses, and to establish and maintain one or more normal-labor schools (so far as said sum will go) for the education and training of the children of said Indians in letters, agriculture, the mechanic arts, and housewifery, which school or schools shall be managed and conducted in such manner as the Secretary of the Interior shall direct. The said Indians hereby stipulating to keep constantly thereat, during at least nine months in the year, all their children between the ages of seven and eighteen years; and if any of the parents, or others having the care of children, shall refuse or neglect to send them to school, such parts of their annuities as the Secretary of the Interior may direct, shall be withheld from them and applied as he may deem just and proper; and such further sum, in addition to the said ten thousand dollars, as shall be deemed necessary and proper by the President of the United States, shall be reserved and taken from their said annuities, and applied annually, during the pleasure of the President to the support of said schools, and to furnish said Indians with assistance and aid and instruction in agricultural and mechanical pursuits, including the working of the mills, hereafter mentioned, as the Secretary of the Interior may consider necessary and advantageous for said Indians; and all instruction in reading shall be in the English language. And the said Indians hereby stipulate to furnish, from amongst themselves, the number of young men that may be required as apprentices and assistants in the mills and mechanic shops, and at

least three persons to work constantly with each white laborer employed for them in agriculture and mechanical pursuits, it being understood that such white laborers and assistants as may be so employed are thus employed more for the instruction of the said Indians than merely to work for their benefit; and that the laborers so to be furnished by the Indians may be allowed a fair and just compensation for their services, to be fixed by the Secretary of the Interior, and to be paid out of the shares of annuity of such Indians as are able to work, but refuse or neglect to do so. And whenever the President of the United States shall become satisfied of a failure, on the part of said Indians, to fulfil the aforesaid stipulations, he may, at his discretion, discontinue the allowance and expenditure of the sums so provided and set apart for said school or schools, and assistance and instruction.

5th. To provide the said Indians with a mill suitable for grinding grain and sawing timber; one or more mechanic shops, with the necessary tools for the same; and dwelling-houses for an interpreter, miller, engineer for the mill, (if one be necessary,) a farmer, and the mechanics that may be employed for their benefit, and to expend therefor a sum not exceeding fifteen thousand dollars.

ARTICLE 5.

Said Indians further stipulate and bind themselves to prevent any of the members of their tribe from destroying or injuring the said houses, shops,

mills, machinery, stock, farming-utensils, or any other thing furnished them by the Government, and in case of any such destruction or injury of any of the things so furnished, or their being carried off by any member or members of their tribe, the value of the same shall be deducted from their general annuity; and whenever the Secretary of the Interior shall be satisfied that said Indians hae become sufficiently confirmed in habits of industry and advanced in the acquisition of a practical knowledge of agriculture and the mechanic arts to provide for themselves, he may, at his discretion, cause to be turned over to them all of the said houses and other property furnished them by the United States, and dispense with the services of any or all persons hereinbefore stipulated to be employed for their benefit, assistance, and instruction.

ARTICLE 6.

It is hereby agreed and understood that the chiefs and headmen of said tribe may, at their discretion, in open council, authorize to be paid out of their said annuities such a sum or sums as may be found to be necessary and proper, not exceeding in the aggregate one hundred and fifty thousand dollars, to satisfy their just debts and obligations, and to provide for such of their half-breed relations as do not live with them, or draw any part of the said annuities of said Indians: Provided, however, That their said determinations shall be approved by their agent for the time being, and the said payments authorized by

the Secretary of the Interior: Provided, also, That there shall not be so paid out of their said annuities in any one year, a sum exceeding fifteen thousand dollars.

ARTICLE 7.

On account of their valuable services and liberality to the Yanctons, there shall be granted in fee to Charles F. Picotte and Zephyr Rencontre, each, one section of six hundred and forty acres of land, and to Paul Dorian one-half a section; and to the half-breed Yancton, wife of Charles Reulo, and her two sisters, the wives of Eli Bedaud and Augustus Traverse, and to Louis Le Count, each, one-half a section. The said grants shall be selected in said ceded territory, and shall not be within said reservation, nor shall they interfere in any way with the improvements of such persons as are on the lands ceded above by authority of law; and all other persons (other than Indians, or mixed-bloods) who are now residing within said ceded country, by authority of law, shall have the privilege of entering one hundred and sixty acres thereof, to include each of their residences or improvements, at the rate of one dollar and twenty-five cents per acre.

ARTICLE 8.

The said Yancton Indians shall be secured in the free and unrestricted use of the red pipe-stone quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone

for pipes; and the United States hereby stipulate and agree to cause to be surveyed and marked so much thereof as shall be necessary and proper for that purpose, and retain the same and keep it open and free to the Indians to visit and procure stone for pipes so long as they shall desire.

ARTICLE 9.

The United States shall have the right to establish and maintain such military posts, roads, and Indian agencies as may be deemed necessary within the tract of country herein reserved for the use of the Yanctons; but no greater quantity of land or timber shall be used for said purposes than shall be actually requisite; and if, in the establishment or maintenance of such posts, roads, and agencies, the property of any Yancton shall be taken, injured, or destroyed, just and adequate compensation shall be made therefor by the United States.

ARTICLE 10.

No white person, unless in the employment of the United States, or duly licensed to trade with the Yanctons, or members of the families of such persons, shall be permitted to reside or make any settlement upon any part of the tract herein reserved for said Indians, nor shall said Indians alienate, sell, or in any manner dispose of any portion thereof, except to the United States. Whenever the Secretary of the Interior shall direct, said tract shall be surveyed and

divided as he shall think proper among said Indians, so as to give to each head of a family or single person a separate farm, with such rights of possession or transfer to any other member of the tribe or of descent to their heirs and representatives as he may deem just.

ARTICLE 11.

The Yanctons acknowledge their dependence upon the Government of the United States, and do hereby pledge and bind themselves to preserve friendly relations with the citizens thereof, and to commit no injuries or depredations on their persons or property, nor on those of members of any other tribe or nation of Indians; and in case of any such injuries or depredations by said Yanctons, full compensation shall, as far as possible, be made therefor out of their tribal annuities, the amount in all cases to be determined by the Secretary of the Interior. They further pledge themselves not to engage in hostilities with any other tribe or nation, unless in self-defence, but to submit, through their agent, all matters of dispute and difficulty between themselves and other Indians for the decision of the President of the United States, and to acquiesce in and abide thereby. They also agree to deliver, to the proper officer of the United States all offenders against the treaties, laws, or regulations of the United States, and to assist in discovering, pursuing, and capturing all such offenders, who may be within the limits of

their reservation, whenever required to do so by such officer.

ARTICLE 12.

To aid in preventing the evils of intemperance, it is hereby stipulated that if any of the Yanctons shall drink, or procure for others, intoxicating liquor, their proportion of the tribal annuities shall be withheld from them for at least one year; and for a violation of any of the stipulations of this agreement on the part of the Yanctons they shall be liable to have their annuities withheld, in whole or in part, and for such length of time as the President of the United States shall direct.

ARTICLE 13.

No part of the annuities of the Yanctons shall be taken to pay any debts, claims, or demands against them, except such existing claims and demands as have been herein provided for, and except such as may arise under this agreement, or under the trade and intercourse laws of the United States.

ARTICLE 14.

The said Yanctons do hereby fully acquit and release the United States from all demands against them on the part of said tribe, or any individual thereof, except the beforementioned right of the Yanctons to receive an annuity under said treaty of

Laramie, and except, also such as are herein stipulated and provided for.

ARTICLE 15.

For the special benefit of the Yanctons, parties to this agreement, the United States agree to appoint an agent for them, who shall reside on their said reservation, and shall have set apart for his sole use and occupation, at such a point as the Secretary of the Interior may direct, one hundred and sixty acres of land.

ARTICLE 16.

All the expenses of the making of this agreement, and of surveying the said Yancton reservation, and of surveying and marking said pipe-stone quarry, shall be paid by the United States.

ARTICLE 17.

This instrument shall take effect and be obligatory upon the contracting parties whenever ratified by the Senate and the President of the United States.

Source: April 19, 1858, 11 Stat 743;
Ratified February 16, 1859;
Proclamation February 26, 1859.

AGREEMENT WITH THE YANKTON SIOUX OR DAKOTA INDIANS, IN SOUTH DAKOTA

Sec. 12. The following agreement, made by J.C. Adams and John J. Cole, commissioners on the part of the United States, with the chiefs, headmen, and other male adults of the Yankton tribe of Sioux or Dakota Indians upon the Yankton Reservation, in the State of South Dakota, on the thirty-first day of December, eighteen hundred and ninety-two, and now on file in the Department of the Interior, and signed by said commissioners on behalf of the United States, and by Charles Martin, Edgar Lee, Charles Jones, Isaac Hepikigan, Stephen Cloud Elk, Edward Yellow Bird, Iron Lngthing, Eli Brockway, Alex Brunot, Francis Willard, Louis Shunk, Joseph Caje, Albion Hitika, John Selwyn, Charles Ree, Joseph Cook, Brigham Young, William Highrock, Frank Felix, and Philip Ree, on behalf of the said Yankton tribe of Sioux Indians, is hereby accepted, ratified, and confirmed.

ARTICLES OF AGREEMENT

Whereas J.C. Adams and John J. Cole, duly appointed commissioners on the part of the United States, did, on the thirty-first day of December, eighteen hundred and ninety-two, conclude an agreement with the chiefs, headmen, and other male adults of the Yankton tribe of Sioux or Dacotah Indians upon the Yankton Reservation, in the State of South Dakota, which said agreement is as follows:

Whereas a clause in the act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth (30th), eighteen hundred and ninety-three (1893), and for other purposes, approved July 13th, 1892, authorizes the "Secretary of the Interior to negotiate with any Indians for the surrender of portions of their respective reservations, any agreement thus negotiated being subject to subsequent ratification by Congress;" and

Whereas the Yankton tribe of Dacotah – now spelled Dakota and so spelled in this agreement – or Sioux Indians is willing to dispose of a portion of the land set apart and reserved to said tribe, by the first article of the treaty of April (19th) nineteenth, eighteen hundred and fifty-eight (1858), between said tribe and the United States, and situated in the State of South Dakota:

Now, therefore, this agreement made and entered into in pursuance of the provisions of the act of Congress approved July thirteenth (13th), eighteen hundred and ninety-two (1892), at the Yankton Indian Agency, South Dakota, by J.C. Adams of Webster, S.D., John J. Cole of St. Louis, Mo., and I.W. French of the State of Neb., on the part of the United States, duly authorized and empowered thereto, and the chiefs, headmen, and other male adult members of said Yankton tribe of Indians, witnesseth:

ARTICLE I.

The Yankton tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid.

ARTICLE II.

In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000), as hereinbefore provided for.

ARTICLE III.

Section 1. Sixty days after the ratification of this agreement by Congress, or at the time of the first interest payment, the United States shall pay to the said Yankton tribe of Sioux Indians, in lawful money of the United States, out of the principal sum stipulated in Article II, the sum of one hundred thousand dollars ($100,000), to be divided among the members of the tribe per capita. No interest shall be paid by the United States on this one hundred thousand dollars ($100,000).

Section 2. The remainder of the purchase money or principal sum stipulated in Article II,

amounting to five hundred thousand dollars ($500,000), shall constitute a fund for the benefit of the said tribe, which shall be placed in the Treasury of the United States to the credit of the said Yankton tribe of Sioux Indians, upon which the United States shall pay interest at the rate of five per centum (5) per annum from January first, eighteen hundred and ninety-three (January 1st, 1893), the interest to be paid and used as hereinafter provided for.

ARTICLE IV.

The fund of five hundred thousand dollars ($500,000) of the principal sum, placed to the credit of the Yankton tribe of Sioux Indians, as provided for in Article III, shall be payable at the pleasure of the United States after twenty-five years, in lawful money of the United States. But during the trust period of twenty-five years, if the necessities of the Indians shall require it, the United States may pay such part of the principal sum as the Secretary of the Interior may recommend, not exceeding $20,000 in any one year. At the payment of such sum it shall be deducted from the principal sum in the Treasury, and the United States shall thereafter pay interest on the remainder.

ARTICLE V.

Section 1. Out of the interest due to the Yankton tribe of Sioux Indians by the stipulations of Article III, the United States may set aside and use

for the benefit of the tribe, in such manner as the Secretary of the Interior shall determine, as follows: For the care and maintenance of such orphans, and aged, infirm, or other helpless persons of the Yankton tribe of Sioux Indians, as may be unable to take care of themselves; for schools and educational purposes for the said tribe; and for courts of justice and other local institutions for the benefit of said tribe, such sum of money annually as may be necessary for these purposes, with the help of Congress herein stipulated, which sum shall not exceed six thousand dollars ($6,000) in any one year: Provided, That Congress shall appropriate, for the same purposes, and during the same time, out of any money not belonging to the Yankton Indians, an amount equal to or greater than the sum set aside from the interest due to the Indians as above provided for.

Section 2. When the Yankton tribe of Sioux Indians shall have received from the United States a complete title to their allotted lands, and shall have assumed all the duties and responsibilities of citizenship, so that the fund provided for in section 1 of this article is no longer needed for the purposes therein named, any balance on hand shall be disposed of for the benefit of the tribe as the Secretary of the Interior shall determine.

ARTICLE VI.

After disposing of the sum provided for in Article V, the remainder of the interest due on the purchase

money as stipulated in Article III shall be paid to the Yankton tribe of Sioux Indians semiannually, one-half on the thirtieth day of June and one-half on the thirty-first day of December of each year, in lawful money of the United States, and divided among them per capita. The first interest payment being made on June 30th, 1893, if this agreement shall have been ratified.

ARTICLE VII.

In addition to the stipulations in the preceding articles, upon the ratification of this agreement by Congress, the United States shall pay to the Yankton tribe of Sioux Indians as follows: To each person whose name is signed to this agreement and to each other male member of the tribe who is eighteen years old or older at the date of this agreement, twenty dollars ($20) in one double eagle, struck in the year 1892 as a memorial of this agreement. If coins of the date named are not in the Treasury coins of another date may be substituted therefor. The payment provided for in this article shall not apply upon the principle sum stipulated in Article II, nor upon the interest thereon stipulated in Article III, but shall be in addition thereto.

ARTICLE VIII.

Such part of the surplus lands hereby ceded and sold to the United States as may now be occupied by the United States for agency, schools, and other

purposes, shall be reserved from sale to settlers until they are no longer required for such purposes. But all other lands included in this sale shall, immediately after the ratification of this agreement by Congress, be offered for sale through the proper land office, to be disposed of under the existing land laws of the United States, to actual and bona fide settlers only.

ARTICLE IX.

During the trust period of twenty-five years, such part of the lands which have been allotted to members of the Yankton tribe of Indians in severalty, as the owner thereof can not cultivate or otherwise use advantageously, may be leased for one or more years at a time. But such leasing shall be subject to the approval of the Yankton Indian agent by and with the consent of the Commissioner of Indian Affairs; and provided that such leasing shall not in any case interfere with the cultivation of the allotted lands by the owner thereof to the full extent of the ability of such owner to improve and cultivate his holdings. The intent of this provision is to compel every owner of allotted lands to cultivate the same to the full extent of his ability to do so, before he shall have the privilege of leasing any part thereof, and then he shall have the right to lease only such surplus of his holdings as he is wholly unable to cultivate or use advantageously. This provision shall apply alike to both sexes, and to all ages, parents acting for their children who are under their control, and the Yankton

Indian agent acting for minor orphans who have no guardians.

ARTICLE X.

Any religious society, or other organization now occupying under proper authority for religious or educational work among the Indians any of the land under this agreement ceded to the United States, shall have the right for two years from the date of the ratification of this agreement within which to purchase the land so occupied at a valuation fixed by the Secretary of the Interior, which shall not be less than the average price paid to the Indians for these surplus lands.

ARTICLE XI.

If any member of the Yankton tribe of Sioux Indians shall within twenty-five years die without heirs, his or her property, real and personal, including allotted lands, shall be sold under the direction of the Secretary of the Interior, and the proceeds thereof shall be added to the fund provided for in Article V for schools and other purposes.

ARTICLE XII.

No part of the principal or interest stipulated to be paid to the Yankton tribe of Sioux Indians, under the provisions of this agreement, shall be subject to the payment of debts, claims, judgments, or demands

against said Indians for damages or depredations claimed to have been committed prior to the signing of this agreement.

ARTICLE XIII.

All persons who have been allotted lands on the reservation described in this agreement and who are now recognized as members of the Yankton tribe of Sioux Indians, including mixed-bloods, whether their white blood comes from the paternal or maternal side, and the children born to them, shall enjoy the undisturbed and peaceable possession of their allotted lands, and shall be entitled to all the rights and privileges of the tribe enjoyed by full-blood Indians.

ARTICLE XIV.

All allotments of lands in severalty to members of the Yankton tribe of Sioux Indians, not yet confirmed by the Government, shall be confirmed as speedily as possible, correcting any errors in same, and Congress shall never pass any act alienating any part of these allotted lands from the Indians.

ARTICLE XV.

The claim of fifty-one Yankton Sioux Indians, who were employed as scouts by General Alf. Sully in 1864, for additional compensation at the rate of two hundred and twenty-five dollars ($225) each, aggregating the sum of eleven thousand four hundred and

seventy-five dollars ($11,475) is hereby recognized as just, and within ninety days (90) after the ratification of this agreement by Congress the same shall be paid in lawful money of the United States to the said scouts or to their heirs.

ARTICLE XVI.

If the Government of the United States questions the ownership of the Pipestone Reservation by the Yankton Tribe of Sioux Indians, under the treaty of April 19th, 1858, including the fee to the land as well as the right to work the quarries, the Secretary of the Interior shall as speedily as possible refer the matter to the Supreme Court of the United States, to be decided by that tribunal. And the United States shall furnish, without cost to the Yankton Indians, at least one competent attorney to represent the interests of the tribe before the court.

If the Secretary of the Interior shall not, within one year after the ratification of this agreement by Congress, refer the question of the ownership of the said Pipestone Reservation to the Supreme Court, as provided for above, such failure upon his part shall be construed as, and shall be, a waiver by the United States of all rights to the ownership of the said Pipestone Reservation, and the same shall thereafter be solely the property of the Yankton tribe of the Sioux Indians, including the fee to the land.

ARTICLE XVII.

No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement.

ARTICLE XVIII.

Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

ARTICLE XIX.

When this agreement shall have been ratified by Congress, an official copy of the act of ratification shall be engrossed, in copying ink, on paper of the size this agreement is written upon, and sent to the

Yankton Indian agent to be copied by letter press in the "Agreement nook" – of the Yankton Indians.

ARTICLE XX.

For the purpose of this agreement, all young men of the Yankton tribe of Sioux Indians, eighteen years of age or older, shall be considered adults, and this agreement, when signed by a majority of the male adult members of the said tribe, shall be binding upon the Yankton tribe of Sioux Indians. It shall not, however, be binding upon the United States until ratified by the Congress of the United States, but shall as soon as so ratified become fully operative from its date. A refusal by Congress to ratify this agreement shall release the said Yankton Indians under it.

In witness whereof, the said J.C. Adams, John J. Cole, and J.W. French, on the part of the United States, and the chiefs, headmen, and other adult male Indians, on the part of the said Yankton tribe of Sioux or Dakota – spelled also Dacotah – Indians, have hereunto set their hands and affixed their seals.

Done at the Yankton Indian agency, Greenwood, South Dakota, this thirty-first day of December, eighteen hundred and ninety-two (Dec. 31st, 1892).

JAMES C. ADAMS, [SEAL.]
JOHN J. COLE, [SEAL.]

The foregoing articles of agreement having been read in open council, and fully explained to us, we,

the undersigned, chiefs, headmen, and other adult male members of the Yankton tribe of Sioux Indians, do hereby consent and agree to all the stipulations therein contained.

Witness our hands and seals of date as above.

Wicahaokdeun (William T. Selwyn), seal; and others:

Therefore,

Be it enacted by the Senate and House or Representatives of the United States of America in Congress assembled, That said agreement be, and the same hereby is accepted, ratified, and confirmed.

That for the purpose of carrying the provisions of this Act into effect there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated the sum of six hundred thousand dollars, or so much thereof as may be necessary, of which amount the sum of five hundred thousand dollars shall be placed to the credit of said tribe in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum from the first day of January, eighteen hundred and ninety-three, said interest to be paid and distributed to said tribe as provided in articles five and six of said agreement. Of the amount herein appropriated one hundred thousand dollars shall be immediately available to be paid to said tribe, as provided in section one of article three of said agreement. There is also hereby appropriated the further sum of ten thousand dollars, or so

much thereof as may be necessary, which sum shall be immediately available, to be paid to the adult male members of said tribe, as provided in article seven of said agreement. There is also hereby appropriated the further sum of eleven thousand four hundred and seventy-five dollars, which sum shall be immediately available, to be paid as provided in article fifteen of said agreement: Provided, That none of the money to be paid to said Indians under the terms of said agreement, nor any of the interest thereon, shall be subject to the payment of any claims, judgments, or demands against said Indians for damages or depredations claimed to have been committed prior to the signing of said agreement.

That the lands by said agreement ceded, to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and town-site laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota: Provided, That each settler on said lands shall, in addition to the fees provided by law, pay to the United States for the land so taken by him the sum of three dollars and seventy-five cents per acre, of which sum he shall pay fifty cents at the time of making his original entry and the balance before making final proof and receiving a certificate of final entry; but the rights of honorably discharged Union soldiers and sailors, as defined and described in

sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged except as to the sum to be paid as aforesaid.

That the Secretary of Interior, upon proper plats and description being furnished, is hereby authorized to issue patents to Charles Picotte and Felix Brunot, and W.T. Selwyn, United States interpreters, for not to exceed one acre of land each, so as to embrace their houses near the agency buildings upon said reservation, but not to embrace any buildings owned by the Government, upon the payment by each of said persons of the sum of three dollars and seventy-five cents.

That every person who shall sell or give away any intoxicating liquors or other intoxicants upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation as created by the treaty of April nineteenth, eighteen hundred and fifty-eight, shall be punishable by imprisonment for not more than two years and by a fine of not more than three hundred dollars.

Source: 28 Stat 286.

YANKTON SIOUX RESERVATION
R 66W
R 65W
R 64W
R 63W
R 62W
T 99N
T 98N
T 97N
T 96N
T 95N
T 94N
T 93N
CHARLES MIX
LEGEND
BRANCH OF REALTY
BUREAU OF INDIAN AFFAIRS

STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF CHARLES MIX	)	FIRST JUDICIAL CIRCUIT

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This matter is before the Court pursuant to an Application for Habeas Corpus filed by James Bruguier on June 13, 1996. The Court previously denied Bruguier's Petition for Habeas Corpus on the current issue, and Bruguier appealed that Order to the South Dakota Supreme Court. On February 20, 1998, the Supreme Court remanded the case back to this Court to determine whether "the incidents in question occurred on 'allotted' land within the 1858 boundaries and whether such land retains 'reservation' status pursuant to 18 USC § 1151(a)."

FACTS/PROCEDURAL HISTORY

On April 22, 1991, a burglary occurred at the Leah Lindstadt residence in Pickstown, South Dakota. On August 21, 1992, a jury found Bruguier guilty of first degree burglary of the Lindstadt residence. On November 5, 1992, Bruguier pled guilty to a habitual offender information and Judge Jay H. Tapken sentenced him to 30 years in the South Dakota State Penitentiary.

Bruguier appealed the conviction to the South Dakota Supreme Court, and his conviction was summarily affirmed. He then filed an Application for Writ of Habeas Corpus, and this Court denied relief in a written opinion issued July 7, 1995. On June 13, 1996, he filed a second Application for Habeas Corpus. In this later Application, he argued the South Dakota Court lacked jurisdiction based upon *Yankton Sioux Tribe v. Southern Missouri Waste Management*

District, 890 F.Supp. 878 (D. S.D. 1995), but the Court denied his Petition based on *State v. Greger*, 1997 SD 14, 559 N.W.2d 854.

Bruguier appealed this Court's decision and, while the case was on appeal, the United States Supreme Court issued its decision in *South Dakota v. Yankton Sioux Tribe*, 118 S.Ct. 789 (1998). The South Dakota Supreme Court then remanded Bruguier's case for a determination of whether the burglary occurred on allotted land and whether this allotted land is still considered a reservation. The parties have stipulated the burglary occurred on allotted land, but this still leaves the issue of whether this land retains reservation status under 18 USC § 1151.

DECISION

In order to determine whether this crime occurred on Indian country as defined in 18 USC § 1151, the Court must make two separate inquiries. First, the Court must determine whether land within the 1858 reservation area retains reservation status under 18 USC § 1151(a). If the Court finds this land is a reservation under 18 USC § 1151(a), there was no jurisdiction to try Bruguier in the South Dakota Courts. If, however, the Court finds this land was not a reservation under 18 USC § 1151(a), it must then determine whether the allotments in this case are Indian country under 18 USC § 1151(c).

The definition of Indian country as defined in 18 USC § 1151 provides for three types of Indian

Country. Under 18 USC § 1151(a) Indian Country is "all land within the limits of any Indian reservation." Under 18 USC § 1151(b), Indian Country is all dependent Indian communities, and, under 18 USC § 1151(c), Indian Country is "all Indian allotments, the Indian titles to which have not been extinguished."

The Court's first inquiry is whether this land is within the limits of an Indian reservation under 18 USC § 1151(a). The State argues in this case that the Yankton Sioux Reservation was disestablished based upon both *DeCoteau v. District County Court for the Tenth Judicial Dist.*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975) and *Yankton Sioux Tribe*. In *Yankton Sioux Tribe*, the United States Supreme Court limited its decision to: "whether unallotted, ceded lands were severed from the reservation." 118 S.Ct. at 805. The Court held Congress had diminished the Yankton Sioux Reservation in 1894, and the unallotted tracts no longer constituted Indian country. *Id.* In *Yankton Sioux Tribe*, the Supreme Court declined to answer whether the reservation was disestablished because it concluded it was not a necessary determination in resolving that case.

The Yankton Sioux Reservation was established in 1858. In 1887, under the Dawes Act (25 USC § 331), the members of the tribe received allotments of reservation land. After these allotments were provided, the United States Government entered into an agreement where the Yankton Sioux Tribe (Tribe) ceded the remaining unallotted lands. This

agreement was then ratified in an 1894 statute. The relevant portions of the agreement can be found in the *Yankton Sioux Tribe* opinion at Note 1.

Article I of the 1894 Act provides the tribe would "cede, sell, relinquish, and convey to the United States all their claim, right, title and interest in and to all the unallotted lands within the limits of the reservation." *Yankton Sioux Tribe,* 118 S.Ct. at 798. Under Article II, the United States pledged a fixed price of $600,000 in return. *Id.* In *Yankton Sioux Tribe,* the United States Supreme Court considered this language and observed that:

> This "cession" and "sum certain" language is "precisely suited" to terminating reservation status. Indeed, we have held that when a surplus land Act contains both explicit language of cession, evidencing "the present and total surrender of all tribal interests," and a provision for a fixed sum payment, representing "an unconditional commitment from Congress to compensate the Indian tribe for its opened land," a "nearly conclusive," or "almost insurmountable," presumption of diminishment arises.
>
> The terms of the 1894 Act parallel the language that this court found terminated the Lake Traverse Indian Reservation in *DeCoteau* . . .

118 S.Ct. at 798 (internal citations omitted).

The Court also considered the savings clause found in Article XVIII.[1] It found "the most plausible interpretation of Article XVIII revolves around the annuities in the form of cash, guns, ammunition, food, and clothing that the tribe was to receive in exchange for its aboriginal claims for 50 years after the 1858 treaty." *Id.* at 799. It then concluded this clause only pertained to the continuance of these annuities and not the 1858 reservation border. *Id.* at 800. Considering the Court's treatment of the savings clause, the clause is not determinative on the issue of whether the reservation is disestablished.

It should also be noted, however, the Court did not find absolute support in the 1894 Act. It recognized that Article VIII of the 1894 Act, "which reserved from sale those surplus lands 'as may now be occupied by the United States for agency, schools, and other purposes,'" counseled against finding the reservation terminated. *Yankton Sioux Tribe,* 118 S.Ct. at 801. Although this language does not support

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[1] Article XVIII provides

> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States And after the signing of this agreement, and its ratification by Congress, all provisions of said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

termination, this language is a subsidiary provision of the agreement. It does not overcome the controlling language found in Article I and II of the Act.

After considering the *Yankton Sioux Tribe* decision, specifically the Court's consideration of Article I and II, the 1894 Act exhibits a clear congressional intent to terminate the reservation. The "cession" and "sum certain" language in the Act clearly supports termination of the reservation under *DeCoteau*. Also, the *Yankton Sioux Tribe* Court specifically found the language in the Lake Traverse agreement involved in *DeCoteau* paralleled the language in the Yankton Sioux Agreement. 118 S.Ct. at 798. The savings clause is not determinative on the issue of whether the reservation is disestablished, and it does not overcome the clear language of Article I and II.

There is also support for disestablishment in the historical context surrounding the passage of the 1894 Act. Although the statutory language is the most probative evidence of diminishment or disestablishment, the Court will consider "the historical context surrounding the passage of the surplus land Acts." *Id.* at 798.

The May 16, 1895 Presidential Proclamation opening the Yankton Sioux lands to settlement stated "the Tribe had 'ceded, sold, relinquished, and conveyed to the United States, all its claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation . . . " *Id.* at 803. The *Yankton Sioux Tribe* Court recognized that this

language was substantially similar to the Presidential Proclamation in *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct 1361 (1977). The *Rosebud* Court described similar language in the Presidential Proclamation involved in that case as "an unambiguous contemporaneous, statement by the Nation Chief Executive, of a perceived *disestablishment.*" *Yankton Sioux Tribe,* 118 S.Ct. at 803 (citing *Rosebud,* 430 U.S. at 602-603, 97 S.Ct. at 1371) (emphasis added). Given the Supreme Court's consideration of this language, it is clear the 1895 Proclamation points to disestablishment of the Yankton Sioux Reservation.

The Commissioners' report of negotiations also supports disestablishment. The Court stated the following concerning this report:

> Moreover, the Commissioners' report of the negotiations signaled their understanding that the cession of the surplus lands dissolved tribal governance of the 1858 reservation. They observed that "now that members of the Tribe have been allotted their lands in severalty and have sold their surplus land – the last property bond which assisted to hold them together in their tribal interest and estate – their tribal interests may be considered a thing of the past." And, in a March 1894 letter to the Chairmen of the Senate Committee on Indian Affairs, several Yankton chiefs and members of the Tribe indicated that they concurred in such an interpretation of the agreement's impact. The letter urged congressional ratification of the agreement,

> explaining that the signatories "wanted the laws of the United States and the State that we live in to be recognized and observed," and that they did not view it as desirable to "keep up the tribal relation as the tribal relation on this reservation is an obstacle and hindrance to the advancement of civilization."

Id. at 802-03. Clearly, the common understanding of the parties involved supports the conclusion that the 1894 Act terminated the reservation.

There is also one other factor which specifically supports the State's position in this case. The Yankton Tribal Constitution defines the Tribal territory to include only those lands "now owned" by the Tribe. *Yankton Sioux Tribe,* 118 S.Ct. at 804-05. If the Tribe intended to consider the allotted lands under consideration in this case as part of a reservation, it should have included this allotted land as part of the Tribal territory in its Tribal Constitution. It did not do this, and this supports the conclusion the allotted lands in which title has been extinguished do not constitute a reservation under 18 USC § 1151(a).

All of the above factors pointing to disestablishment are consistent with the practical realities of how the land within the 1858 borders, both allotted lands in which there is no remaining Indian title and unallotted land, has been treated up to 1995. The State took jurisdiction of the territory in 1894 and this went unchallenged until almost 100 years later. *Yankton Sioux Tribe,* 118 S.Ct. at 804. All criminal

offenses committed on non-trust land were tried in state court. *State v. Greger,* 1997 SD 14, ¶ 27, 559 N.W.2d 854, 866. The Tribe ceded the unallotted land in 1894 and diminished that portion of the reservation. Non-Indians purchased much of the original allotted lands, and, after the purchase, the land was treated as non-reservation land. Therefore, it is clear from Congressional intent, the Presidential Proclamation, the Commissioners' report, the Tribal Constitution, and the later treatment of the lands within the 1858 reservation boundaries that the reservation was terminated by the 1894 Act. The allotted lands are no longer a reservation under 18 USC § 1151(a).

This still leaves the question of whether the allotted lands are Indian country under 18 USC § 1151(c). Allotments may still be Indian country under 18 USC § 1151(c) if "the Indian title to [the allotment has] not been extinguished . . . " Lands which Indian title has been extinguished are no longer Indian country.

The lands upon which the crime was committed in this case were originally Indian allotments under 18 USC § 1151(c). These allotments were then sold to non-Indians in fee. Although the allotted lands retained Indian country status for some time, as the Indian allotments left Indian title, the land lost the Indian country status. Some allotments, however, remained in allotted status and are Indian country under 18 USC § 1151(c). Essentially those lands are allotments in which Indian title has not been extinguished. The land where the crime occurred in this

case, however, is an allotment to which Indian title has been extinguished; at the time the crime was committed, the land was owned in fee status by non-Indians. Therefore, it was no longer Indian country under 18 USC § 1151(c). This conclusion is consistent with the South Dakota Supreme Court's reasoning in *State ex rel. Hollow Horn Bear v. Jameson*, 95 N.W.2d 181 (S.D. 1959).

CONCLUSION

The area within the original 1858 borders no longer retains reservation status under 18 USC § 1151(a). Further, the allotment on which this crime occurred is not Indian country under 18 USC § 1151(c). The title to the land in question has long been held in fee by non-Indians and Indian title has been extinguished. Therefore, the State of South Dakota had jurisdiction to try Bruguier. Defendant's Attorney may prepare Findings of Fact and Conclusions of Law and an Order consistent with this decision.

Dated at Yankton, South Dakota this 30th day of June, 1998.

BY THE COURT:

/s/ Kathleen Caldwell
Honorable Kathleen Caldwell
Circuit Court Judge

STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF CHARLES MIX	)	FIRST JUDICIAL CIRCUIT
JAMES BRUGUIER, Petitioner,	)	Civ. 96-63
v.	)	FINDINGS OF FACT
JOSEPH CLASS, Respondent.	)	AND CONCLUSIONS OF LAW

FINDINGS OF FACT

(Filed Aug. 17, 1998)

1. On August 21, 1992, Petitioner, James Bruguier, was found guilty of the first degree burglary of the Lindstadt residence in Pickstown, South Dakota, which burglary had occurred in 1991. On November 5, 1992, Bruguier pled guilty to a habitual offender information and was sentenced to thirty years in the South Dakota State Penitentiary.

2. Petitioner appealed to the South Dakota Supreme Court, and his conviction was upheld. *State v. Bruguier*, 510 N.W.2d 126 (S.D. 1993) (table). Petitioner did not raise any jurisdictional arguments in that appeal.

3. Petitioner filed a state petition for writ of habeas corpus which was denied in a written opinion issued July 7, 1995.

4. Bruguier subsequently filed a second writ of habeas corpus, the present action, which was denied by this Court on March 7, 1997. *Bruguier v. Class*, First Judicial Circuit, Charles Mix County, Civ. 96-63 (Mar. 7, 1997). Bruguier subsequently filed a Notice of Appeal and Appellant's Brief in the South Dakota Supreme Court.

5. On January 26, 1998, the United States Supreme Court decided the case of *South Dakota v. Yankton Sioux Tribe*, 118 S.Ct. 789 (1998).

6. Petitioner and the State filed a joint stipulation, affidavits, and briefs before the South Dakota Supreme Court. Essentially, the parties requested the South Dakota Supreme Court to resolve the question of whether "allotted lands" which had left Indian hands remained "Indian country" because they constituted a "reservation" pursuant to 18 U.S.C. § 1151(a). The South Dakota Supreme Court, however, on February 20, 1998, entered an "Order of Remand" in which it removed the matter from the February nonoral calendar, and remanded to this Court

> for all required legal and factual determinations, including whether the incident in question occurred on "allotted" land within the 1858 boundaries and whether such land retains "reservation" status pursuant to 18 U.S.C. § 1151(a).

Order of Remand, *Bruguier v. Class*, No. 20216 (Feb. 20, 1998).

7. Subsequently, on March 5, 1998, the Clerk of the Supreme Court of South Dakota gave notice by letter to the parties, as follows:

> The Court has considered your joint motion and stipulation filed in the above-referenced matter and has determined that in view of the order of remand, you may wish to submit such motion and stipulation to the trial court.

Letter of Dorothy A. Smith, Clerk, Supreme Court of South Dakota, March 5, 1998.

8. Pursuant to the suggestion of the South Dakota Supreme Court, the parties have submitted their joint motion dated February 5 and February 6, 1998, a new stipulation, and accompanying affidavits (one of which is new) to this Court. The parties have also submitted briefs in support of their positions. The Court grants the relief requested in the joint motion.

8A. Subsequent to this Court's memorandum decision, Petitioner moved this Court to reconsider its case and to supplement the record. The State of South Dakota objected but this Court has determined to reconsider the case and to allow both parties to supplement the record with materials filed in the ongoing federal litigation.

9. This Court's Findings and Conclusions are based upon relevant decisions of the courts, the record in *State v. Greger*, 1997 S.D. 14, 559 N.W.2d 854 (which incorporates the record in the case which

reached the United States Supreme Court), the affidavits, the supplemental materials referred to above, and the stipulation of the parties. The parties have stipulated, inter alia, that the burglary occurred on allotted land, the Indian title to which has been extinguished.

10. In 1858, the Yankton Indians entered into a treaty with the United States by which it ceded approximately eleven million acres to the United States. The Tribe retained an area later determined to encompass approximately 430,405 acres.

11. In 1892, after negotiations with the Yankton Indians, negotiators for the United States and a majority of the members of the Yankton Sioux Tribe signed an agreement. By Article I of the agreement, the members of the Tribe agreed to "cede" all of their unallotted lands to the United States. In Article II, the United States agreed to compensate the Tribe in a sum certain of $600,000, which amounted to $3.60 per acre.

12. The agreement was ratified by Congress on August 15, 1894, 28 Stat. 286, and on May 21, 1895, President Cleveland issued a proclamation opening the ceded lands.

13. At the time of the proclamation in 1895, the United States had title to 168,000 acres of the area. Individual Indians had allotments of approximately 262,000 acres. The Tribe did not hold any land.

14. A majority of the allotments granted to members of the Tribe were subsequently conveyed in fee by the members of the Tribe to non-Indians.

15. Of the approximately 260,000 acres originally allotted to Indians, by 1913, just twenty-one years later, the tribal members held only 70,000 acres. (Exhibit 22.) They had thus divested themselves of over 190,000 acres. By 1930, tribal members owned only 43,358 acres.

16. At present, total Indian holdings in the region constitute approximately 30,000 acres of allotted or trust land and 6,000 acres of tribal land.

17. Prior to 1998, the Tribe has never alleged that a reservation existed which constituted all of the lands which were allotted to individual members in 1894, regardless of whether those allotments had been transferred into non-Indian hands.

18. The record in the *Yankton Sioux Tribe* litigation reveals that the Tribe, prior to the litigation which culminated in the decision of the United States Supreme Court, entirely confined its jurisdiction to activities on trust land. The tribal chairman, during the *Yankton Sioux Tribe* litigation, admitted he did not know of any case in which the Tribe brought a criminal prosecution against a tribal member in tribal court for a crime occurring on nontrust land; nor did the tribal chairman claim game and fish enforcement on nontrust land or any other sort of jurisdiction over nontrust land.

19. The Tribe's assertion of jurisdiction and of "Indian country" status has been historically confined entirely to trust land, prior to the *Yankton Sioux Tribe* litigation.

20. State jurisdiction, on the other hand, has been exercised over all nontrust lands since the time of the 1894 Act. As the South Dakota Supreme Court found in *State v. Greger*, 1997 S.D. 14, ¶ 27, 559 N.W.2d 854, "All criminal offenses on nontrust land (91% of the region) are handled in state courts. Since 1895, the year the reservation was opened, South Dakota courts have consistently maintained, without intervention by federal or tribal authorities, civil and criminal jurisdiction within the former reservation boundaries."

21. The South Dakota Supreme Court's finding is well supported by the testimony of the tribal chairman, county commissioner Jack Soulek, and officers of the State of South Dakota, including those of Game, Fish and Parks, the Department of Environment and Natural Resources, and the Department of Agriculture. The State has made no distinction between nontrust lands which were (1) allotted and then transferred into non-Indian fee ownership and (2) ceded lands. Both classes of lands have been treated as nontrust or non-Indian lands having no characteristics of "Indian country" or of a "reservation," and the State has exercised criminal and civil jurisdiction with regard to those lands.

22. This Court also takes judicial notice of its own files and finds that this Court, which is vested with civil and criminal jurisdiction over the affected area, has not distinguished between allotted lands in non-Indian ownership and ceded lands in non-Indian ownership. All of these nontrust lands have been treated as nonreservation and non-"Indian country" lands within state jurisdiction as a historical matter up to the time of the *Yankton Sioux Tribe* case.

22A. The court, in addition, has examined the supplementary materials submitted by the parties, including, in particular, Exhibit 530. Exhibit 530 includes articles from the *Lake Andes Wave*, a local newspaper which records crimes of various Indian persons in the period from 1907 through 1917. In addition, the court has examined the State's Exhibits 534 through 562. These exhibits strongly confirm that the state courts regularly exercised jurisdiction over Indians within Lake Andes and at other locations regardless of whether the lands had once constituted Indian allotments. The Court particularly notes the case of *State v. Stricker*, Exhibit 548, which is the only case in which the State was found not to have jurisdiction. This case involved the crime of an Indian of assault with a dangerous weapon on then-allotted lands. The dismissal of this case by the state court, coupled with the exercise of jurisdiction by the state courts and cases which undoubtedly occurred on allotments, the Indian title to which had been extinguished, confirms that the only "Indian country" remaining in the area, in the understanding of both

Indians and non-Indians, was allotments, the Indian title to which had *not*, been extinguished.

23. The United States, likewise, has not distinguished between nontrust lands which are formerly allotted lands and which are ceded lands. The United States has not exercised its "Indian country" criminal jurisdiction beyond lands actually held in trust. The South Dakota Supreme Court in *Greger*, 1997 S.D. 14, ¶ 27, 559 N.W.2d 854, also found that the Tribe had not attempted to exercise criminal jurisdiction in the area and was clearly referring to offenses on "nontrust" land. *Id.*

23A. The Court has likewise examined the supplementary materials submitted by the Petitioner and by the State of South Dakota in this regard. The Court has not found therein a single document by which it is shown that the United States exercised its "Indian country" criminal jurisdiction beyond lands then actually held in trust. The failure of the parties to produce such document is strongly indicative of the fact that no such document exists.

23B. The court gives considerable credence to the affidavit of United States Attorney David Vrooman who served as Assistant United States Attorney from October 1965 to June 1969 and as United States Attorney from May 1977 through September 1978; to the affidavit of William Clayton who served as United States Attorney from 1968 through 1977; and to the affidavit of Phil Hogan, who served as United States Attorney from October 1981

to December 1991. All three United States Attorneys confirmed that federal "Indian country" jurisdiction during their terms of office was confined to "Indian trust lands" or lands which the United States "held in trust for the Yankton Sioux Tribe or the Yankton Sioux tribal members." All three United States Attorneys thus confirm, in effect, that no "reservation" was considered to exist in the area throughout this entire period (in the view of the officials of the United States with the primary law enforcement authority).

23C. The Court also gives considerable deference to the affidavit of retired state circuit court judge Paul Kern. Judge Kern served a total of ten years between 1961-72 either as Charles Mix County State's Attorney or as Deputy State's Attorney. Judge Kern was a circuit court judge in 1974 and served in that capacity until 1995. The Court credits the testimony of Judge Kern in his affidavit that when he took office as state's attorney in 1963, virtually all law enforcement in Charles Mix County was conducted by the State of South Dakota. Such law enforcement extended not only to deeded lands but to all lands held in trust except for the ten major crimes. Judge Kern's affidavit states that neither the United States nor the Yankton Sioux Tribe objected to this arrangement. Judge Kern's affidavit also extends to the period prior to 1963 in that Judge Kern's father practiced law in Lake Andes beginning in the 1920's and served as Charles Mix County State's Attorney from 1931 and again in 1959-60. Judge Kern states that his father informed him that during all these

periods, the State enforced state law everywhere in Charles Mix County except for the ten major crimes occurring on trust land. Judge Kern's father-in-law, the county sheriff for over thirty years in the 1940's, 50's, and 60's, informed the judge that that was the way jurisdiction was conducted in Charles Mix County during that period of time. This valuable evidence is effectively unrefuted and is credited by the Court.

23D. The court has also examined the Exhibit 570, the County Commissioners' handwritten record covering the period from 1896 through 1897. This County Commissioners' record demonstrates the prompt integration of Indians under the political life of the county following the disestablishment of the reservation. It also indicates that the County Commissioners themselves indicated that the reservation had ceased to exist and consistently referred to the area as the "*former*" Yankton Indian Reservation or by using similar terminology.

23E. The court has examined Government Exhibit 16, a report by Professor Hoover. The report apparently is intended to indicate that a Court of Indian Offenses existed within the Yankton area from 1884 through 1943. However, the transcript of the recent hearing before the district court, *see* T 151, and the actual exhibits before the court, indicate that the Court of Indian Offenses was abolished in 1909. *See* Government Exhibit 19, Annual Report 1910 at 12; *id.*, Annual Report 1918 at 3; *id.*, Annual Report 1924 at 3; *id.*, Annual Report 1926 at 2, 3; Annual Report

1927 at 2; *id.*, Annual Report 1928 at 2; *id.*, Annual Report 1930 at 2. The heart of Professor Hoover's claim thus lacks a factual basis.

23F. The court has also examined the other scattered federal documents submitted by the Petitioner. Most of these documents are apparently intended to show that the reservation has not been changed since 1858. Such a position is flatly inconsistent with the United States Supreme Court holding in *South Dakota v. Yankton Sioux Tribe* and these documents are not credible in light of that decision of the United States Supreme Court.

23G. The Court also notes original Exhibit 15, an opinion of the Acting Solicitor of May 8, 1969. In that document, the United States declared that it had "assumed criminal jurisdiction only to the extent provided in 18 U.S.C. §§ 1152-65 on unpatented trust tracks, since they fall within the definition of 'Indian country,' 18 U.S.C. 1151." The Court finds that by this document, in 1969, the United States acknowledged that no reservation existed in the area under 18 U.S.C. 1151(a) and that the only "Indian country" remaining was trust allotments, the Indian title to which had not been extinguished, pursuant to 18 U.S.C. 1151(c).

23H. The Court also gives credence and weight to the testimony of the BIA Superintendent at Yankton at the recent federal court hearing. The Superintendent testified that the jurisdictional situation at Yankton in 1993 when he arrived was the same as it

had been at Sisseton when he left that same year. In other words, at both locations, the United States exercised its jurisdiction only over trust lands and treated both areas as disestablished. The identical treatment of Sisseton and Yankton, coupled with the long-established United States Supreme Court declaration that Sisseton has been disestablished, strongly indicates an unequivocal recognition by the BIA that the Yankton Reservation has been disestablished.

24. The testimony of the tribal chairman at the original trial indicated that the United States had not exercised criminal jurisdiction over any person within the nontrust areas of the 1858 reservation, without reference to whether the nontrust areas were former allotted lands or were ceded lands, and this Court credits that testimony.

25. According to the United States Department of Census, non-Indians comprise over two-thirds of the population, or approximately 68 percent of the population of the area within the 1858 boundaries. The Court finds that the Census statistics were not undermined by the BIA statistics submitted at the recent federal hearing. These latter statistics were undermined by the witness presenting them on questioning by the Honorable Lawrence Piersol and, moreover, lack even facial credibility.

26. The Court finds no evidence that residents or governments of the area, Indian or non-Indian, in the last century, have advocated or claimed the existence of a reservation which consisted of allotted

lands, without regard to whether the lands had left Indian title.

27. The Court has examined the map attached to the Second Affidavit of State's Attorney dated February 18, 1998, and finds that neither civil nor criminal jurisdiction has been determined in the past on the basis of such a map.

28. The Court has also examined the BIA map which was put before the United States Supreme Court as App. 159 and before the South Dakota Supreme Court as Ex. 906. The Court finds that this map indicates the consistent approach of the courts, including this Court, federal courts, and the tribal courts, toward civil and criminal jurisdiction in the area; areas in blue, green, and purple have regularly been found to be within state and local jurisdiction and not under federal and tribal civil and criminal jurisdiction. In making this and the determination above, the Court has relied upon the record in *Greger* and has taken judicial notice of the historical records of this Court.

29. The crime for which Petitioner Bruguier was convicted took place on formerly allotted lands, the Indian title to which has been long extinguished. The lands are now held in fee title by non-Indians.

30. The map circulated by representatives of the United States following the decision of the United States Supreme Court, together with the maps submitted by the state's attorney and the city attorneys for Lake Andes, Pickstown, and Wagner, indicate the

absurd jurisdictional result which would occur if the theory of the Petitioner is adopted here.

31. Land within the three cities is all or virtually all now fee land. Some of the land base is "allotted" lands and some is "ceded" land. Such lands have never before been treated differently for criminal or civil jurisdictional purposes when in fee status.

32. The theory proposed by the Petitioner would result in a jumble of proposed "reservation" and "nonreservation" land. Moreover, since none of the citizens within the area, Indian or non-Indian, and none of the law enforcement agencies, Indian or non-Indian, have in the past treated the lands differently, the result of adoption of the Petitioner's argument would be a very substantial upset to the "reasonable expectations" of the persons who lived in the area.

33. The persons who live in the area, both Indian and non-Indian, have acted as if and have reasonably expected that land in non-Indian status would not have any "Indian country" characteristics and certainly would not be classified as a "reservation." A conclusion that allotted lands which have left allotted status are in fact "reservation" lands, would therefore severely upset the justifiable expectations of Indians and non-Indians alike, with regard to both civil and criminal jurisdictional matters.

34. The upset is particularly severe because non-Indians may not participate in tribal elections, serve on tribal juries, or serve in tribal office. Nonetheless, the government of the Yankton Sioux Tribe

has indicated that it may desire to exercise jurisdiction over these non-Indians. The reasonable expectations of the non-Indians would be upset by a conclusion that the allotted lands which left allotted status remain as part of a "reservation."

35. The bizarre shape of the new "reservation" also would upset the "reasonable expectation" of the parties, both Indian and non-Indian.

36. The Court notes that the county seat of Charles Mix County was moved in 1916 from Wheeler to Lake Andes. Wheeler is clearly not on a reservation. However, the county courthouse in 1916 was placed upon formerly allotted land in fee status in Lake Andes which is now claimed to be a "reservation." The Court finds that this action of the county in 1916 reinforces its view that no person, Indian or non-Indian, believed that the allotted lands which have left Indian ownership were in fact "reservation." Clearly, the county would not, in 1916, have put its courthouse on "reservation" land when abundant nonreservation land was available elsewhere in the county.

CONCLUSIONS OF LAW

1. This Court is bound by the legal conclusions and findings of the United States Supreme Court in the case entitled *South Dakota v. Yankton Sioux Tribe*, 118 S.Ct. 789 (1998). This Court is also bound by the legal conclusions and findings of the South Dakota Supreme Court in *State v. Greger*, 1997 S.D.

14, 559 N.W.2d 854, insofar as those conclusions and findings are not inconsistent with those of the United States Supreme Court in the *Yankton Sioux Tribe* litigation.

2. The rationale of the United States Supreme Court in *South Dakota v. Yankton Sioux Tribe* compels the result that the entire reservation has been disestablished or terminated. The only "Indian country" remaining in the area is found in Indian "allotments, the Indian title to which has not been extinguished." 18 U.S.C. § 1151(c), as defined by the Court.

3. The United States Supreme Court in the *Yankton Sioux Tribe* litigation found that Articles I and II of the 1894 Act with the Yankton Tribe were equivalent to those at issue in the Lake Traverse agreement. The United States Supreme Court also found that the language of Articles I and II was precisely suited to "terminating reservation status" and that the language of the Yankton Act paralleled the language of the Lake Traverse Act which the Supreme Court found "terminated the Lake Traverse Indian Reservation. . . ."

4. The United States Supreme Court also rejected any basis for distinguishing between the Lake Traverse agreement and the Yankton Sioux Tribe agreement.

5. On the basis of the Supreme Court conclusions that the Lake Traverse agreement and the Yankton Sioux agreement were equivalent, and that

the former agreement entirely terminated the Lake Traverse Indian Reservation, the Court concludes that the Yankton Sioux Reservation must also have been entirely terminated.

6. The Court concludes that the *Yankton Sioux Tribe* court authoritatively found the Presidential Proclamation discussed in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1997) to be "substantially similar" to that pronounced by the president in the *Yankton Sioux Tribe* case.

7. Based upon that conclusion, this Court concludes that the Yankton proclamation was likewise an unambiguous, contemporaneous statement by the President of disestablishment. This Court further concludes that, inasmuch as the proclamation in *Rosebud* referred to *all* lands within the limits of the county there at issue, the Proclamation in this case should likewise be understood to disestablish the *entirety* of the reservation here at issue.

8. The United States Supreme Court in *Yankton Sioux Tribe* concluded that the common understanding of the time contemporaneous to the 1894 agreement was that reservation status was coextensive with tribal ownership. After the 1894 agreement, the Yankton Tribe did not retain any land in tribal ownership. Therefore, it follows that, in the common understanding, there could be no "reservation status" after 1894. Because "common understanding" of the parties, including the United States Congress, the negotiators, and the Tribe, should be honored, this Court

accordingly concludes that after 1894 there existed no "reservation" in the area.

9. The United States Supreme Court found that Article XVIII of the 1894 agreement referred only to the "continuation of annuities, not to the 1858 borders." Accordingly, this Court concludes that the savings clause is irrelevant to the question presented here.

10. The Court finds persuasive the United States Supreme Court's comment that the record of negotiations between the Commissioners and the Yankton Tribe in 1892 contained no discussion of the preservation of the 1858 boundaries. The Court is also aware that the negotiations contained no discussion of the creation of a new boundary which would be enclosed around the allotted lands.

11. The Court concludes that if new, difficult to understand boundaries were being created at Yankton, they would most certainly have been discussed. The Court concludes that because no new boundaries were discussed, that is a very strong indication that none of the parties, the Tribe, nor the United States, intended any new boundaries to be created.

12. The treatment by the United States Supreme Court of the demography of the area indicates the disestablishment of the entire reservation; the Supreme Court's treatment includes *all* areas which went into non-Indian hands and not merely *ceded*

lands which went into non-Indian lands. This is indicative of termination of the entire reservation.

13. Moreover, independently of the United States Supreme Court's treatment of the area, this Court concludes that the fact that non-Indians have purchased over 220,000 acres of land which were formerly allotted and that Indians and non-Indians alike have thereafter treated those lands as nonreservation lands, gives rise to the conclusion that the lands, after they left Indian hands, were not "Indian country" nor were they a "reservation."

14. The United States Supreme Court treatment of the subsequent jurisdictional history is applicable to disestablishment of the entire reservation, and not merely to the ceded lands. The Court concludes that this treatment is indicative of termination of the entire reservation.

15. The Court concludes that the probative value given by the *Yankton Sioux Tribe* court to the tribal constitutions also indicates disestablishment of the entire reservation. The Tribe there relied on two constitutions, that of 1932 and 1962. Neither constitution made any distinction between "ceded" lands and "allotted lands" whether the allotted lands were within Indian or non-Indian ownership. Indeed, the 1962 constitution claims jurisdiction only over tribal lands within the 1858 boundaries "now owned" by the Tribe. The failure of the Tribe to claim "allotted" lands as constituting a "reservation" in either of the tribal constitutions leads to the conclusion that the

Tribe did not intend the allotted lands to constitute a reservation. Moreover, the fact that this constitution was examined by the BIA, and approved by the BIA without any reference to the language cited above, indicates that the BIA likewise did not intend to assert that the "allotted lands" constituted a "reservation."

15A. The Court has also examined the 1990 revision of the tribal constitution. The revision purports to include the entire area within the 1858 boundaries as a present-day reservation. The Court finds the 1990 amendment adds little or nothing to the analysis. The tribe found the matter so insignificant that it did not submit the matter to this Court, the South Dakota Supreme Court, or to the United States Supreme Court. The BIA officer in charge of the agency was not even aware of the existence of the amendment until the last few months, indeed after the United States Supreme Court made its decision in this case. Finally, the Court notes that the 1990 amendment is radically inconsistent with the United States Supreme Court decision in *South Dakota v. Yankton Sioux Tribe*. Under that case, there is no reservation which includes all of the area of the 1858 reservation.

16. Based upon long-standing civil and criminal jurisdictional practice reflected in the *Greger* record upon the supplemental materials submitted to this Court, and upon this Court's judicial notice of the records of this Court, the Court concludes that the justifiable expectations of the parties are that the

area has entirely lost reservation status and specifically that allotted lands as to which Indian title has been extinguished do not retain "Indian country" or "reservation" status. The justifiable expectations of the parties would be severely upset were a declaration to be entered that allotted lands which have left Indian title constitute a "reservation" pursuant to 18 U.S.C. § 1151(a).

17. The Petitioner has argued, essentially, that the decision of the United States Supreme Court in *Yankton Sioux Tribe* was intended to vest jurisdiction in the allotted lands to the Tribe. The Court concludes, however, that the Supreme Court's decision did not provide any jurisdiction in favor of the Tribe or the federal government but found only that the "unallotted tracts no longer constitute Indian country." The Court specifically did not determine the question of whether the allotted lands which had left Indian title should be defined as "Indian country" or as a "reservation" pursuant to 18 U.S.C. § 1151(a).

18. The Court further concludes that the prior decisions of the Eighth Circuit Court of Appeals and the United States District Court in the *Yankton Sioux Tribe* litigation have no further force and effect. The United States Supreme Court has entered a decision which "reversed" the judgment of the Court of Appeals for the Eighth Circuit. When an appellate court reverses a decision, the decision reversed no longer holds any force or effect. Thus, even if the opinion of the Eighth Circuit Court of Appeals is determined to have encompassed more lands as a reservation than

the United States Supreme Court acted on, the decision of the Eighth Circuit no longer has any effect because it was reversed. Moreover, the Eighth Circuit has now formally "vacated" its decision and "recalled" its mandate. The decision of the district court likewise can have no such effect.

19. The decision for the Court of Appeals for the Tenth Circuit in *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997) (*cert. denied*) is irrelevant to this litigation. The 1997 Ute Indian Tribe case determined that under "law of the case" and "mandate" doctrines, a 1985 decision of the court of appeals remains largely in effect. No such doctrines are implicated in this case, especially in light of the fact that the Eighth Circuit has recalled its own mandate.

20. The recent decision of the United States Supreme Court in *Alaska v. Native Village of Venetie*, 118 S.Ct. 948 (1998) illustrates the operation of the "Indian country" definition applicable to this case. The "Indian country" definition emerged from case law and was ultimately codified at 18 U.S.C. § 1151. There are three kinds of "Indian country." The first kind of "Indian country" constitutes "reservations." 18 U.S.C. § 1151(a). The second, not involved in this controversy, constitutes "dependent Indian communities." 18 U.S.C. § 1151(b). The third constitutes "all Indian allotments', the Indian titles to which have not been extinguished. . . ." 18 U.S.C. § 1151(c). Prior to 1894, all the lands within the 1858 boundaries constituted a "reservation" and were "Indian country." At the time of the adoption of the 1894 Act, all of the

lands within the area lost their status as "reservation" under 18 U.S.C. § 1151(a). Nonetheless, all of the *allotted lands* retained "Indian country" status as "Indian allotments, the Indian titles to which have not been extinguished . . . " pursuant to what was to become 18 U.S.C. § 1151(c).

21. As the Indian allotments left "Indian title," the lands, at that moment, lost "Indian country" status under 18 U.S.C. § 1151(c).

22. Congress therefore provided for an immediate end to a substantial portion of "Indian country" status and a gradual end to most of the remainder. Lands which remain in allotted status to this day retain "Indian country" status under 18 U.S.C. § 1151(c). Lands which were "Indian allotments" in 1894 but, as to which the Indian title has been "extinguished" have lost all "Indian country" status.

23. The lands in this case were originally Indian allotments under 18 U.S.C. § 1151(c). They have long since lost Indian title and are owned in fee status by non-Indians. Therefore, they no longer remain "Indian country," under any subpart of 18 U.S.C. § 1151.

24. The Court concludes that no lands within the area of the 1858 reservation retain "reservation" status pursuant to 18 U.S.C. § 1151(a). The original Indian allotments which retain allotted status (in other words, those Indian allotments the Indian titles to which have not been extinguished), retain "Indian country" status pursuant to 18 U.S.C. § 1151(c); the

incident, however, is not alleged to have occurred on such lands.

25. The Court concludes that it has jurisdiction of this matter.

26. Because the only claim raised by Petitioner is that the Court is without jurisdiction, the Court concludes that the claim, and the petition for writ of habeas corpus, should be denied by the Court.

Dated this 14th day of August, 1998.

BY THE COURT:

/s/ Kathleen Caldwell
Circuit Court Judge

ATTEST:

/s/ Deborah S. Pfeffer
Clerk of Courts

By: _____
Deputy

(SEAL)

FILED

No. 10-932

JAN 18 2011

OFFICE OF THE CLERK

In The Supreme Court of the United States

PAM HEIN, STATE'S ATTORNEY OF CHARLES MIX COUNTY; KEITH MUSHITZ, MEMBER OF THE CHARLES MIX COUNTY, SOUTH DAKOTA, COUNTY COMMISSION; NEIL VONESCHEN, MEMBER OF THE CHARLES MIX COUNTY, SOUTH DAKOTA, COUNTY COMMISSION; JACK SOULEK, MEMBER OF THE CHARLES MIX COUNTY, SOUTH DAKOTA, COUNTY COMMISSION,

Petitioners,

v.

YANKTON SIOUX TRIBE AND UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI, VOLUME II

PAMELA HEIN
Charles Mix County
State's Attorney
P.O. Box 370
Lake Andes, SD 57356
(605) 487-7441

TOM D. TOBIN
Counsel of Record
P.O Box 730
422 Main Street
Winner, SD 57580
(605) 842-2500
tobinlaw@gwtc.net

SCOTT GREGORY KNUDSON
BRIGGS AND MORGAN, P.A.
2200 IDS Center
Minneapolis, MN 55402
(612) 977-8400

Attorneys for County Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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No. 99-1490

IN THE
Supreme Court of the United States

STATE OF SOUTH DAKOTA; WILLIAM JANKLOW, Governor of South Dakota; MARK W. BARNETT, Attorney General of South Dakota; SCOTT PODHRADSKY, State's Attorney of Charles Mix County; HERMAN PETERS, Member of the Charles Mix, South Dakota, County Commission; BRUCE BAKKEN, Member of the Charles Mix, South Dakota, County Commission; JACK SOULEK, Member of the Charles Mix, South Dakota, County Commission; SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Petitioners,

v.

YANKTON SIOUX TRIBE, and its individual members; UNITED STATES OF AMERICA, on its own behalf and for the benefit of the Yankton Sioux Tribe; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF CITIES DANTE, GEDDES, LAKE ANDES, PICKSTOWN, PLATTE, RAVINIA AND WAGNER, *AMICI CURIAE*, IN SUPPORT OF PETITIONERS STATE OF SOUTH DAKOTA, CHARLES MIX COUNTY AND SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT

TIMOTHY R. WHALEN
Counsel of Record
WHALEN LAW OFFICE, P.C.
P. O. Box 127
Lake Andes, SD 57356
(605) 487-7645

INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37(4), the Cities of Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, respectfully submit this brief as *amici curiae,* in support of Petitioners State of South Dakota, Charles Mix County, and Southern Missouri Waste Management District. Five of the *amici* Cities, Wagner, Lake Andes, Ravinia, Dante and Pickstown are located within the 1858 boundaries of the Yankton reservation. Every one of these Cities is situated, in whole or in part, on the former allotments now held in fee, that are squarely at issue here. Two of the *amici* Cities, Geddes and Platte, lie close to the 1858 boundaries. Each of the Cities has operated, since its founding a few years after the 1894 Yankton Act, as if no reservation boundaries exist.

The vital concern that prompts the filing of this *amici curiae* brief can be simply stated. Prior to this litigation, all the courts and parties had recognized that the 1858 Yankton reservation no longer existed. Now, a century later, a large portion of the area of Charles Mix County, South Dakota, including, in whole or in part, the *amici* Cities of Dante, Geddes, Lake Andes, Pickstown, Ravinia and Wagner, is still at issue. Consequently, the approximately 6,000 people that reside in this area still face the prospect of being suddenly thrust into the status of residents of an Indian reservation.

Here, ninety percent (90%) of the land is owned by nonmembers and over two-thirds (⅔) of the residents are nonmembers who reside on small farm and in small towns and cities like Dante, Lake Andes, Pickstown, Ravinia, and Wagner. In all, there are forty-nine (49) political subdivisions within the county.

The expectations of the people in this area should not be lightly regarded or simply set aside. *Hagen v. Utah*, 510 U.S. 399, 421 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605 (1977); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356-357 (1998). Nevertheless, the United States has consistently ignored this prudential consideration. For these reasons, the issue is of grave importance to the residents, the Cities and the other units of local governments in Charles Mix County, South Dakota.

It is profoundly disturbing that reservation status is even a possibility after this Court unequivocally rejected the argument of the Yankton Sioux Tribe and United States that would have resurrected the 1858 reservation boundaries in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (*Yankton I*). This *amici curiae* brief of the Cities will focus on the role that the relentless advocacy of the United States has played in this process in this case, and in other similar cases.

Importantly, the United States did not even file a Petition for Certiorari in this case when it was due on May 2, 2000. This recent development is especially noteworthy in light of the fact that on remand, the United States was granted leave to intervene as a plaintiff in this litigation. The arguments the United States submitted thereafter caused additional conflict and confusion.

Clearly, the United States does not consider that the rejection of the arguments submitted by the United States and the Yankton Sioux Tribe in the court of appeals, present this Court with a question that is certworthy. This is a significant concession by the United States even if the United States subsequently supports, in any fashion, the Petition filed by the Yankton Sioux Tribe.

Moreover, although the *amicus curiae* brief that follows, for the most part, was drafted prior to the recent decision of the United States to not file a Petition in this case, it is still significant because it

summarizes the advocacy of the United States in cases of this kind and sheds light on the unprecedented nature of this decision of the United States. The argument also provides a perspective from which any subsequent submission by the United States in this case should be viewed. All of this further supports the Petition for a Writ of Certiorari filed by the State of South Dakota, Charles Mix County and Southern Missouri Waste Management District.

SUMMARY OF ARGUMENT

The Cities fully support the position set forth in the Petition for Writ of Certiorari of the State of South Dakota, Charles Mix County and Southern Missouri Waste Management District. Pet. for Writ of Cert., *South Dakota v. Yankton Sioux Tribe*, No. 99-1490, (Mar. 7, 2000). The Cities agree that the decision of the panel conflicts squarely with the relevant decisions of the Supreme Court of the State of South Dakota and this Court.[1] This brief will address the role of the United States in the entire process.

A fair reading of *Seymour v. Superintendent*, 368 U.S. 351 (1962), *Mattz v. Arnett*, 412 U.S. 481 (1973), *DeCoteau v. District County Court*, 420 U.S. 425

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[1] *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999). In this light, the Cities further agree that something less than full plenary attention may be appropriate in this instance. *See* Pet. for Writ of Cert., 3 n.2, *South Dakota v. Yankton Sioux Tribe*, No. 99-1490).

(1975), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), *Solem v. Bartlett*, 465 U.S. 463 (1984), *Hagen v. Utah*, 510 U.S. 399 (1994) and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), clearly undermines the continuing reservation status of the Yankton reservation recognized by the panel. Petitioners highlight these important principles and, for that reason, they will not be repeated here.

However, a proper perspective regarding the history of this disestablishment litigation before this Court is also important in order to accurately assess the Petitions in conjunction with the principles set forth in these decisions. This brief is intended to serve that purpose and provide that perspective.

In *Yankton I*, Charles Mix County reviewed the primary arguments presented and rejected in each reservation boundary case decided by this Court, as well as the historic perspective available or established at the time. Br. of Charles Mix County, South Dakota in Supp. of Pet'r, *Yankton I*, 522 U.S. 329 (1998) (No. 96-1581). For the convenience of the Court, the Cities have reproduced that brief in the Cities' appendix. *See* County Brief, Cities App. 1 a-33a. To complete the perspective, the Cities have also reproduced every brief and oral argument that the United States has submitted in this Court in these cases. Cities App. 34a-189a, 233a-272a.

The County brief recounts in summary fashion the case by case developments in this litigation. *See* County Brief, City App. 6a-20a, 27a-29a. A review of

this chronology establishes three overriding themes. First, as one would expect, each time the Court was presented with this issue, more primary sources were available from which a proper historical perspective could be reconstructed and the intent of Congress more conclusively ascertained. The opinions reflect this documentation.

Second, the views of the United States are especially noteworthy. The United States has never failed to advocate the resurrection of original reservation boundaries, presumably because of a perceived obligation to support the tribal position. The shifting, but very sophisticated, arguments of the United States (for the most part repeatedly rejected by this Court) have mainly served to perpetuate the confusion and conflict in this area of federal Indian law, fueling the prospect of additional litigation.

The central arguments of the United States are also closely examined for another reason. As will be seen, the United States has repeatedly made a number of important general concessions in this Court, subsequent to *DeCoteau,* regarding the *effect of cession agreements,* like this one, on Indian reservations. These *general cession concessions,* made in conjunction with submissions that urged the continued recognition of other original reservation boundaries, cannot be explained away. The views of the United States in this regard, submitted to this Court, merit continued consideration. *See* chronology summarized in County Brief, Cities App. 15a-20a, 27a-29a. *See*

also Briefs of United States, Cities App. 88a-189a, Tr. of Oral Arguments, Cities App. 250a-266a.

The County brief also addresses in chronological order, the *specific cession concessions* of the United States regarding the disestablishment of the 1858 Yankton Sioux reservation effected by the passage of the 1894 Yankton Sioux cession act. *See* County Brief, Cities App. 20a-27a. For example, in 1984, the United States formally submitted this Yankton reservation disestablishment concession in the Eighth Circuit Court of Appeals. *United States v. Dion,* 752 F.2d 1261 (8th Cir. 1985) *rev'd in part by, United States v. Dion,* 476 U.S. 734 (1986). *Id.* at 20a, 21a. The United States did so in order to maintain a cession distinction in *Solem* essential to its argument there supporting original reservation boundaries. Br. for the United States as *Amicus Curiae* Supp'g Resp't, *Solem v. Bartlett,* 465 U.S. 463 (1984) (No. 82-1253).

Moreover, in other litigation also pending at the same time, and also dealing with the 1858 Yankton Sioux reservation and the 1894 Yankton Sioux cession act, the United States acknowledged that this Court's decision in *DeCoteau* involved "a similar and contemporaneous cession agreement" with "the same language" and "purpose." Br. for the United States, *Yankton Sioux Tribe v. South Dakota,* 796 F.2d 241 (8th Cir. 1986), *cert. denied,* 483 U.S. 1005 (1986), Cities App. 199a, County Brief, Cities App. 26a-27a. Significantly, Article XVIII of the 1894 act that the United States insisted was so important in *Yankton I,*

was not mentioned in any of this. Act of August 15, 1894, 28 Stat. 286, 318.

To complete the perspective, the Cities review the briefs and oral argument the United States submitted in *Yankton I*. The Cities have appended the Briefs of the United States and excerpts from the transcripts of the oral argument of the United States in *Yankton I* that highlight the inconsistencies in the position of the United States. Cities App. 202a-232a, 266a-272a. Further, the Cities review the analysis this Court set forth in *Yankton I* that squarely rejected the position of the United States. Finally, the Cities track the argument of the United States since that time and the manner in which the courts below have mistakenly relied upon the representations of the United States in the process of deciding this case.

Because the United States sought an extension of time in two separate instances in this Court, until May 2, 2000, we did not really know what position the United States would ultimately adopt before this Court in this litigation. We now know that the United States will not file a Petition for Certiorari in this Court. Clearly, this is a significant concession.

Past experience suggests that the United States will eventually support whatever argument the Yankton Sioux Tribe chooses to advance. Of course, we could be pleasantly surprised, but nothing in the arguments submitted to date by the United States would support that supposition.

One thing is fairly certain. The United States will not honor the position advanced by the Office of the Solicitor General in this Court in *Yankton I* (i.e. that disestablishment was inevitable if the argument of the United States regarding Article XVIII was rejected and the 1858 Yankton boundaries were not recognized by this Court, because *nothing* in the Yankton documentation supported any other conclusion.) Brief for United States, Cities App. 202a-232a; Tr. of Oral Argument at 270a-271a, *Yankton I,* 522 U.S. 329 (1998) (No. 96-1581), Cities App. 266a. This Court in *Yankton I* did reject the argument of the United States and the 1858 reservation boundaries were not recognized.

Nevertheless, within days of the *Yankton I* decision, the United States reneged on the inevitable disestablishment argument it presented to this Court, even before the case was remanded to the district court. Since then, the United States has adopted several other conflicting arguments to continue supporting the position of the Yankton Sioux Tribe that the 1858 reservation boundaries should be resurrected. And the fact that the United States has decided not to file a Petition for a Writ of Certiorari does not change any of this.

At some point in time, the "litigating position" of the United States in this type of case should be subject to heightened scrutiny. *South Dakota v. Bourland,* 508 U.S. 679, 697 (1993). *See also Washington v. Yakima Indian Nation,* 439 U.S. 463, 477-478 n.20 (1979)

("[United States] recently changed its position diametrically").

In this regard, the fact that this Court did not extend an invitation to the United States to express the views of the United States at the petition stage in *Yankton I* is hopefully of some significance. The rejection of the position of the United State in *Yankton I* also merits special notation. And clearly, the conflicting arguments the United States has submitted since that time further substantiate the claim that no principled reason exists to give any special credence to the position of the United States in cases of this nature.

ARGUMENT

I. THE SHIFTING ARGUMENTS OF THE UNITED STATES ARE WITHOUT MERIT.

A. Nothing In The Yankton Documents Indicated That Article XVIII Of The 1894 Act Was Intended To Alter The Fundamental Attributes Of The Yankton Cession.

> MR. MANN: Well, the language in *DeCoteau* said that the Indians cede, sell, relinquish and convey to the United States all their claim, right, title, and interest in the land in question, and the statute in *Rosebud* stated that the Indians cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all the land in question.

> *It would be rather difficult, I think, to construe that language as language that allowed the Indians to retain sovereignty over the land.*
>
> QUESTION: I think you're probably right. . . .

Tr. of Oral Argument at 25, *Hagen,* (No. 92-6281), Cities App. 263a-264a (emphasis added).

In *DeCoteau,* the United States argued against cession disestablishment and lost. After the decision of this Court in *DeCoteau,* even the United States repeatedly acknowledged that Congress routinely intended cession statutes such as the Yankton cession to disestablish reservation areas. Brief of United States, Cities App. 88a-189a. Before *Yankton I,* the United States did not attempt to circumvent the holding in *DeCoteau* regarding this type of cession, openly acknowledging, as in *Hagen,* that it would be "rather difficult" to support any other construction. *Id.* at 263a-264a.

In *Yankton I,* the United States ignored *DeCoteau* and that traditional cession analysis and advocated the "narrower" position ultimately adopted by the Court of Appeals in *Yankton I. Yankton Sioux Tribe v. Southern Missouri Waste Dist.,* 99 F.3d 1439, 1448, 1457 (8th Cir. 1996).

Nothing of substance could be cited by either the United States or the panel majority in *Yankton I* to support this anomalous and otherwise "rather difficult" construction. Brief for United States, Cities App.

at 32a. Moreover, the prior views of the United States, summarized above, precluded this "narrower" view – at least in the absence of some *affirmative* evidence of congressional intent to the contrary. In this respect, generic arguments loosely tied to the Article XVIII savings clause should not have sufficed. Article XVIII was not intended to alter the fundamental attributes of the Yankton cession – and not a single word in any of the Yankton documentation supported the position of the United States. Nevertheless, the court of appeals was persuaded by the argument of the United States.

This Court in *Yankton I* unanimously rejected the Article XVIII savings clause argument of the United States. First, the Court noted that the holding of the court of appeals keyed on this circuitous argument:

> The court relied *primarily* on the saving clause in Article XVIII, reasoning that, given its "unusually expansive language," other sections of the 1894 Act "should be read narrowly to minimize any conflict with the 1858 treaty." *Id.*, at 1447.

Yankton I, 522 U.S. at 342 (emphasis added).

This Court then disposed of the argument in no uncertain terms:

> The United States urges a similarly "holistic" construction of the agreement, which would presume that the parties intended to modify the 1858 Treaty only insofar as necessary to open the surplus lands for settlement,

> without fundamentally altering the treaty's terms.
>
> Such a literal construction of the saving clause, as, the South Dakota Supreme Court noted in *State v. Greger,* 559 N.W. 2d 854, 863 (1997), would "impugn the entire sale.". . . .
>
> Moreover, the Government's contention that the Tribe intended to cede some property but maintain the entire reservation as its territory contradicts the common understanding of the time: that tribal ownership was a critical component of reservation status. . . .
>
> Rather than read the saving clause in a manner that eviscerates the agreement in which it appears, we give it a "sensible construction" that avoids this "absurd conclusion.". . .

Yankton I, 522 U.S. at 345, 346.

The sensible construction adopted by the Court in *Yankton I* reflects the traditional cession analysis set forth in *DeCoteau.*

B. The Cession Concessions Of The United States In *Yankton I* With Reference To Disestablished Reservation Boundaries Are Significant And Controlling Here.

In the process of advancing the Article XVIII savings clause argument, the United States conceded that but for the presence of Article XVIII, the 1894 Yankton act would have disestablished the 1858

Yankton reservation in the traditional sense recognized by this Court in *DeCoteau*. In oral argument, the United States, in response to direct questions from this Court, described that process in the following manner:

> QUESTION: Now this – this is a *totally* checker boarded situation?
>
> MS. MCDOWELL: That's correct, And this Court – . . . .
>
> MS. MCDOWELL: Well, the Court in DeCoteau, found total diminishment. But that was a different case, in several respects, from this one. In the first place, of course, there was no savings clause preserving rights under an earlier treaty. . . .
>
> QUESTION: But do you – do you agree with both counsel, it seemed to me, that the choice is either we accept your argument based on Article XVIII or there's a diminishment?
>
> MS. MCDOWELL: That's correct.
>
> QUESTION: That there is no such thing as diminishment applicable on these facts?
>
> MS. MCDOWELL: That's correct. Diminishment seems to be limited to cases such as Roseboud, where there was a selling or a ceding of a part of the reservation in so many words, as opposed to this sort of situation

Tr. Oral Argument, *Yankton I,* Cities App. 270a-271a. (emphasis added).

The totally checker boarded situation or "total diminishment" holding of the Court in *DeCoteau* (in the words of the United States), resulted from the extinguishment of the reservation boundaries by the act at issue there. *DeCoteau*, 420 U.S. at 427 n.2, 446-447. Also, as the United States further conceded in response to the last question from this Court, the Yankton cession was not a diminishment where there was only a "ceding of a *part* of the reservation" ("as *opposed* to this sort of situation"). *Id.* (emphasis added). The Yankton cession was a cession of *all* of the reservation that was not allotted. On these facts, diminishment in the sense of maintaining any portion of the 1858 reservation boundary was not possible, as the United States conceded.

For this reason, the entire 1858 reservation boundary was within the scope of the cession in *Yankton I*. In this respect, the rejection of the Article XVIII savings clause argument of the United States by this Court resulted in the extinguishment of the 1858 reservation boundary, "total diminishment" of the 1858 Yankton reservation. The United States clearly conceded the point.

C. This Court Has Made Clear That The 1858 Reservation Boundaries Of The Yankton Reservation Were Not Maintained.

The 1894 Act is also readily *distinguishable* from surplus land Acts that the Court has interpreted as *maintaining reservation*

> *boundaries*. . . . The Tribe asserts that because that clause purported to conserve the provisions of the 1858 Treaty, the *existing reservation boundaries were maintained*. . . . [W]e *conclude* that the saving clause pertains to the *continuance* of annuities, *not the 1858 borders*.

Yankton I, 522 U.S. at 345-347 (emphasis added).

The Cities do not disagree with the argument in the Petition that the manner in which this Court in *Yankton I* treated the operative cession language should be controlling in resolving this case. In fact, as a practical matter, a fair reading of *Yankton I* and other precedent of this Court almost mandates this conclusion.

In order to simplify the issue, however, the Cities have approached the question of reservation disestablishment in this *amici curiae* brief from a different perspective, although the end result is still the same. *We have focused directly on this Court's discussion of the 1858 reservation boundaries.* The Cities specifically address the shifting position of the United States with reference to that discussion and to the holding of the district court *reinstating* the 1858 reservation boundaries. All of this clearly establishes that the decisions of the district court and the Eighth Circuit Court of Appeals are both erroneous.

1. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998)

(a) As a preliminary matter, it is logical to focus on the 1858 reservation boundaries because that is the manner in which cession precedent has been traditionally understood. In other words, if a cession removed lands from a reservation, it did so by extinguishing the reservation boundaries around the area affected. *For decades, every court in every case, every federal Indian law text, every historian and every commentator that reviewed this precedent have agreed on this fundamental point.*

In this case, the United States can not cite a single example to the contrary. On the other hand, references to support this understanding are commonplace. As early as 1975, even the title of a note in the North Dakota Law Review reflected this understanding; INDIANS – RESERVATIONS – JURISDICTIONAL EFFECT OF SURPLUS LAND STATUTE UPON *TRADITIONAL BOUNDARIES* OF AN INDIAN RESERVATION. James M. Bekken, Comment, *Indians – Reservations – Jurisdictional Effect of Surplus Land Statute Upon Traditional Boundaries of an Indian Reservation*, 52 N.D. L. Rev. 411, 417 (1975) (emphasis added).

In the text of the note, the analysis is directed to the effect of surplus land statutes on reservation boundaries. For example, in the discussion of *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (the cession this Court in *Yankton I*, 522 U.S.

at 344, described as "parallel" to the Yankton Act) the law student structured the statement of the issue in boundary terms:

> *DeCoteau* has clearly shown that to determine the effect a particular statute had on reservation *boundaries* the Court must. . . .

Bekken, *supra* at 418 (emphasis added).

This concentration on the extinguishment of reservation boundaries is also routinely acknowledged even by tribal advocates who disagree with reservation disestablishment. For example, see the "boundaries" discussion throughout Susan D. Campbell, *Reservations: The Surplus Lands Acts and the Question of Reservation Disestablishment,* 12 Am. Ind. L. Rev. 57, 58, 63, 64, 71, 75, 96 (1984).

(b) With the extinguishment of reservation boundaries, it has also followed, *a fortiori,* that the Indian country remaining in the affected area, if any, would be either dependent Indian communities under 18 U.S.C. § 1151(b) or Indian trust allotments under 18 U.S.C. § 1151(c). *Every court in every case, every federal Indian law text, every historian and every commentator are also in agreement in this instance.*[2]

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[2] In the court of appeals, even the United States, in the alternative, finally acknowledged the legitimacy of this analysis. Br. of Plaintiff-Intervenor/Appellee United States of America at 26 n. 3, *Yankton II,* 188 F 3d 1010 (8th Cir. 1999) (Nos. 98-3893, 3894, 3896, 3900).

In 1914, this Court made this point clear in *United States v. Pelican*, 232 U.S. 442 (1914) with respect to Indian trust allotments. In this situation, allotments subsequently held in fee (the primary issue here) are no longer "Indian country." *Pelican* was codified in 18 U.S.C. § 1151(c).[3]

Moreover, a recognition that this Court expressly held that the 1858 reservation boundaries were extinguished by this cession for a sum certain is not in any way inconsistent with the fact that the Court specifically reserved the question of whether the reservation was disestablished altogether. *Yankton I*, 522 U.S. at 358. That entirely distinct issue must still be decided in this case.

For these reasons, the Cities respectfully submit that this Court intended that the subject of the remand would be limited to the "reservation status" of only existing trust allotments, dependent Indian communities, and other trust lands. When reservation boundaries are extinguished, this would ordinarily be the case. See the reference in *Yankton I* to "conflicting understandings about the status of the reservation" and the "fact that the tribe continues to own land in common." *Yankton I*, 522 U.S. at 358. These contentions do not directly implicate the status

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[3] This Court recently reaffirmed and explained the analysis and codification of Pelican in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 528-529 (1998). *See also DeCoteau*, 420 U.S. at 427 n.2, 446-447, *Rosebud*, 430 U.S. at 586, 601 n.24, 613-615 n.47, 615-616 n.48.

of fee lands, which are predominantly owned and populated by non-members. *See Yankton I*, 522 U.S. at 356-357.

In other words, *Yankton I* clearly resolved the status of the 1858 reservation boundaries. *See Yankton I*, 522 U.S. at 333, 343, 345, 345-346, 347, and 353.

Because of the law of the case, the 1858 boundary issue should not have even been addressed in this remand.

All else aside, this Court made clear in *Yankton I* that the 1858 "reservation boundaries" were *not* "retained" or "maintained" – "we *conclude . . . continuance* of annuities, *not the 1858 borders*." *Id.* at 347 (emphasis added). At the very least, the Court decided that question. The Court stated that the "case" presented the question of whether "Congress *diminished the boundaries*" of the Yankton Sioux Reservation. *Id.* at 333 (emphasis added). The unresolved issue, as the Court also clearly stated, was "whether Congress disestablished the reservation altogether." *Id.* at 358. That issue should not have involved resurrecting the status of 1858 reservation boundaries.

2. *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135 (D.S.D. 1998) *rev'd* 188 F.3d 1010 (8th Cir. 1999) *petition for cert. filed* (U.S. Mar. 7, 2000) (No. 99-1490).

The district court ignored all of the above and simply held that even after Yankton I, the 1858 reservation boundaries were still intact. Yankton II, 14 F.Supp.2d at 1143. ("If the original exterior boundaries remain, as it appears they do from the Supreme Court's opinion"). *See also Yankton II,* No. 98-4042 (D.S.D. Oct. 5, 1998) (order denying motion for new trial at 3) ("The Court has now held that the remaining lands *within the 1858 boundaries* remain a part of the Yankton Sioux Reservation"). The district court was clearly mistaken (for the second time).

The strength of that conclusion is further supported by an express concession of the United States in the remand in June, 1998. At that time, the *United States conceded, in the district court, that this Court in Yankton I recognized that Congress did not intend to maintain the 1858 reservation boundaries:*

> [T]he United States Supreme Court found the savings clause *insufficient to maintain the reservation boundaries of the 1858 Treaty* here, and thus did not prevent diminishment of the Reservation. . . .

Summ. J. Br. for the United States at 22 n. 5, *Yankton II,* 14 F.Supp.2d 1135 (D.S.D. 1998) (No. 98-4042) (emphasis added). *See also* Summ. J. Br. for the

United States at 2, 5, 6. Nevertheless, the United States made other arguments in support of the position of the Yankton Sioux Tribe.

After the district court recognized the 1858 reservation boundaries in *Yankton II*, the United States never again mentioned this extinguished boundary concession or the manner in which the holding of the district court conflicted with the express language of this Court in *Yankton I*.

3. *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999) *petition for cert. filed* (U.S. Mar. 7, 2000) (No. 99-1490).

(a) In their brief to the court of appeals, the United States avoided any discussion of the express conflict between the holding of the district court and the conclusion of this Court in *Yankton I* regarding the 1858 reservation boundaries. As a result, the brief for the United States did not affirmatively support the tribal claim that the district court was correct in concluding that the 1858 reservation boundaries still exist.

The only reference that even indirectly addresses this aspect of the 1858 boundaries issue appears in the conclusion of the brief of the United States. The United States concluded:

> The Yankton Sioux Reservation continues to exist in *diminished form*, encompassing the unceded lands under the 1894 Act. The

> language of the 1894 Act, the legislative and negotiation history, and other surrounding circumstances *support diminishment*. . . .

Br. of Plaintiff-Intervenor/Appellee United States of America at 52, *Yankton II*, 188 F.3d 1010 (8th Cir. 1999) (Nos. 98-3893, 3894, 3896, 3900) (emphasis added).

The United States never explained how the Yankton reservation could exist in this "diminished form" nor exactly what the United States meant by "diminishment" (except, of course, to claim the "diminished form" *encompasses all unceded land*). However, one thing is perfectly clear. This "diminished form" argument conflicts with *everything* the United States told this Court in *Yankton I*. *See* the "total diminishment" discussion *supra*.

According to the United States in *Yankton I*, nothing in the Yankton documentation supported diminishment in any form whatsoever. For example, in the court of appeals in *Yankton I*, the views of the United States mirrored those of the Yankton Sioux Tribe with respect to the *lack of any evidence to support changed, altered, or diminished reservation boundaries:*

> The 1892 Agreement, the ratifying Act, and other legislative and historical evidence do *not* indicate an intent by Congress to diminish or disestablish the Reservation.

Br. for United States as *Amicus Curiae* in Supp. of Plaintiffs-Appellees at 3, *Yankton I*, 99 F.3d 1439 (8th

Cir. 1996) (No. 95-2647) (emphasis added). *See also id.* at 4, 5, 8-15.

Significantly, in this Court in *Yankton I,* the United States, as *amicus curiae,* again agreed with this aspect of the historical record:

> But there was *no discussion* of whether the Agreement, if ratified, would alter the boundaries of the Reservation.
>
> *Solicitor Cohen notes . . . Since the 1892 agreement there has been no redefinition by Congress of the Yankton Reservation. . . .*

Br. for the United States as *Amicus Curiae* Supporting Resp'ts at 5, 25, *Yankton I,* 522 U.S. 329 (1998) (No. 96-1581), 206a, 226a, (emphasis added). Cities App.

The court of appeals viewed the argument to recognize the Yankton reservation in the form resurrected by the district court in light of all of the above. In addition to the opinion of this Court, all *Yankton I* briefs and related documents were made part of the record in *Yankton II.* Moreover, in oral argument members of the panel in the court of appeals in *Yankton II* expressly referenced the transcript of oral argument in this Court in *Yankton I* directed to the scope of the cession.

In this instance, the United States could not convince the court of appeals to affirm the holding of the district court. *Instead, the court of appeals expressly confirmed that the 1858 reservation boundaries were*

extinguished by the 1894 Yankton act. See Yankton II, 188 F.3d at 1020-1021, 1030.

This part of the conclusion of the court of appeals is clearly correct. For this reason, nevertheless, the United States will probably attempt to skirt this issue again and not directly address the status of the 1858 reservation boundaries. If the United States repeats the argument in this Court in support of the holding of the district court, its submission will not contain any direct reference to the status of the 1858 reservation boundaries. Instead, the United States will advance some other argument that otherwise generally supports the holding of the district court. The failure of the United States to specifically address the status of the 1858 reservation boundaries undermines the position of the United States.

(b) In other respects, the holding of the court of appeals is fundamentally flawed. With specific reference to the diminished reservation, the holding of the court of appeals is suspect for several reasons. First, as even the Yankton Sioux Tribe noted in its application for a stay, the court of appeals has adopted a "third" option. Mot. for Stay Pending Pet. for Writ of Cert., *Yankton II,* 188 F.3d 1010 (8th Cir. 1999) (No. 98-3893, 3894, 3896, 3900). Importantly, no one, including the United States, argued that this third option was supported by anything in the *Yankton* documentation. Moreover, no one even suggested that the third option was a possibility in the district court or the court of appeals. As a result, the third option

issue was not briefed or argued in either the district court or the court of appeals.

Importantly, the Yankton Sioux Tribe agrees with Petitioners that the "third option" holding of the court of appeals appears to be "inconsistent with all prior Supreme Court cases." *Id.* at 1-2.

> The parties to this appeal argued in their petitions for rehearing that prior Supreme court cases allowed for two possible resolutions to the captioned appeal [1858 reservation boundaries in tact or extinguished]. The circuit decision creates a third option, which appears to be *inconsistent with all prior Supreme court cases.* Whether the Supreme Court will approve this third option is *clearly a substantial issue.*

Id. at 1-2 (emphasis added).

Although the Cities disagree with the Tribe on the reason for the inconsistency, whether this Court eventually agrees with the Tribe (1858 reservation boundaries intact) or with the Petitioners, State of South Dakota, Charles Mix County, and Southern Missouri Waste Management District (1858 reservation boundaries extinguished) is really beside the point at this stage in the proceedings. The important fact is that the parties agree that the "third option" holding of the court of appeals is inconsistent with precedent from this Court; the parties further agree that this inconsistency presents this Court with a substantial question.

Moreover, the "diminished form" of the Yankton reservation now recognized by the court of appeals in *Yankton II,* also conflicts with the testimony of both of the expert witnesses for the United States in district court in *Yankton II* (these were the *only* witnesses to testify). And the recently adopted litigation position of the United States that boldly asserts that the Yankton legislation is truly "unique" adds nothing to the credibility of this position. Br. of Pl.-Intervenor/Appellee United States of America at 10, *Yankton II,* 188 F.3d 1010 (8th Cir. 1999) (Nos. 98-3893, 3894, 3896, 3900). The Yankton documentation also squarely refutes this notion. See the discussion in the Southern Missouri Waste Management District brief under subheading I-A, "A SUMMARY OVERVIEW ESTABLISHES THAT THE CONGRESSIONAL PROCESS FOR THE YANKTON ACT FOLLOWED A STANDARD OPERATING PROCEDURE" at 7-12, Br. for Southern Missouri Waste Management Dist. at 7-12, *Yankton II,* 188 F.3d 1010 (8th Cir. 1999) (Nos. 98-3893, 3894, 3896, 3900).

D. The Fact That The United States Has Decided Not To File A Petition Is Important.

This is a significant concession. In light of the nature of the advocacy set forth *supra,* this concession further supports the Petition for a Writ of Certiorari filed by the State of South Dakota, Charles Mix County and Southern Missouri Waste Management District.

CONCLUSION

For the foregoing reasons, and those stated in the Petition of the State of South Dakota, Charles Mix County and Southern Missouri Waste Management District, that Petition for Writ of Certiorari should be granted.

Respectfully submitted,

TIMOTHY R. WHALEN
Counsel of Record
WHALEN LAW OFFICE, P.C.
P. O. Box 127
Lake Andes, SD 57356
(605) 487-7645

Dated May 8, 2000

APPENDIX

No. 96-1581

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF SOUTH DAKOTA,

Petitioner,

v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents,

and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF CHARLES MIX COUNTY, SOUTH DAKOTA, *AMICUS CURIAE*, IN SUPPORT OF PETITIONER, STATE OF SOUTH DAKOTA

INTEREST OF *AMICUS CURIAE*

The vital concern that prompts the filing of this *Amicus* Brief can be simply stated. Prior to this litigation, all the courts and parties had recognized that the 1858 Yankton reservation no longer existed. Now, a century later, more than half of the area of Charles Mix County, South Dakota, is at issue. Consequently, the approximately 6,000 people that reside there presently face the prospect of being suddenly thrust into the status of residents of an Indian reservation. If this takes place, their officials would have only limited jurisdiction and the nonmembers would have no elected voice in the governance of their affairs and property by the Yankton Sioux Tribe.

The demographics of Charles Mix County in this area are similar to other non-reservation rural counties found in the State of South Dakota and the United States. This is a county that has a significant rural farm population. In terms of agricultural productivity, the land consistently produces above average yields on a state-wide basis. Approximately ninety-eight percent (98%) of the acres in Charles Mix County are classified as farm land. This farm land has an above average valuation and an above average assessed dollars per acre worth. *Ninety* percent of the land is owned by non-members and over *two-thirds* of the residents are non-members who reside on these small farms and in small towns and cities like Dante, Lake Andes, Pickstown, Ravinia and Wagner. *See* Brief for the Cities as *Amici Curiae*.

In all, there are forty-nine (49) political subdivisions within the county.

Although this Court has repeatedly recognized in this situation, that the justifiable expectations of the people should not be lightly regarded or simply swept aside, the panel majority ignored that prudential advice. *Hagen v. Utah*, 510 U.S. 399, 421 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605 (1977). For these reasons, the issue here is of grave importance to the residents and governments of Charles Mix County, South Dakota.

By contrast, here, as in *Hagen*, it is also important to restate what is not at issue. *Hagen*, 510 U.S. at 421. The Indian trust lands and the seat of the Yankton Sioux tribal government situated on Indian trust lands ("tribal headquarters area at Marty") are not at issue. *State v. Greger*, 559 N.W.2d 854, 859 n.4 (S.D. 1997), Pet. App. at 135. *See also* Cities Pet. Brief at 7 n.1 (Marty).

The Supreme Court of the State of South Dakota subsequently considered the identical disestablishment question in *State v. Greger*, Pet. App. at 125. In a unanimous opinion, the State Supreme Court rejected the views of the panel majority and reaffirmed the longstanding position that the Yankton reservation was disestablished. The County would submit that the views of the State Supreme Court are more in line with the principles formulated by this Court, principles that should have been controlling here.

Importantly, this is only the second time that any federal court of appeals has ever held that a congressional act of this nature did not disestablish the reservation area affected; the first and only other case with a similar holding was promptly reversed in *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

SUMMARY OF ARGUMENT

The County fully supports the arguments set forth in the Brief of the State of South Dakota. The County further agrees that the decision of the panel majority conflicts substantially with the relevant decisions of this Court. This brief will focus on that conflict and the role of the United States in the entire process.

A fair reading of *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v. Arnett*, 412 U.S. 481 (1973); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Solem v. Bartlett*, 465 U.S. 463 (1984) and *Hagen v. Utah*, 510 U.S. 399 (1994), clearly undermines the views set forth by the panel majority. The State highlights these important principles and, for that reason, they will not be repeated here.

In addition, however, a proper perspective regarding the history of disestablishment litigation before this Court is important in order to accurately assess the views of the panel majority and the dissent in conjunction with the principles set forth in these

decisions. This brief is intended to serve that purpose and provide that perspective. The County starts with a brief review of the primary arguments presented and rejected in each case decided by this Court, as well as the historic perspective available or established at the time.[1] Such a review advances three overriding themes.

First, as one would expect, each time the Court was presented with this issue, more primary sources were available from which a proper historical perspective could be reconstructed and the intent of Congress more conclusively ascertained. The opinions reflect this documentation.

Second, the views of the United States are especially noteworthy. The United States rarely fails to advocate the resurrection of original reservation boundaries, presumably because of a perceived obligation to support the tribal position. The shifting, but very sophisticated, arguments of the United States (for the most part repeatedly rejected by this Court) have mainly served to perpetuate the confusion and

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[1] This brief does not address the decision of this Court in *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753 (1985) in detail, only because it is not truly a disestablishment case. However, *Oregon* does involve a cession agreement and the *Oregon* opinion, sheds considerable light on understanding the cession process. The Supreme Court of South Dakota in *Greger* cited and discussed *Oregon* in several instances. Pet. App. at 140 n.6, 149, 150. For all of these reasons, *Oregon* is important and merits consideration in this case.

conflicts in this area of federal Indian law, fueling the prospect of additional litigation.

The central arguments of the United States are therefore closely examined for another reason. As will be seen, the United States repeatedly has made a number of important *concessions* in this Court, subsequent to *DeCoteau*, regarding the *effect of cession agreements*, like this one, on Indian reservations. These cession concessions, made in conjunction with submissions that urged the continued recognition of other original reservation boundaires, cannot be explained away. The views of the United States in this regard, submitted to this Court, merit continued consideration.

This brief also addresses, in chronological order, the specific concessions of the United States regarding the disestablishment of the 1858 Yankton Sioux reservation effected by the passage of the 1894 Yankton Sioux cession act. *Infra* at 5. In 1984, the United States formally submitted this Yankton disestablishment concession in the Eighth Circuit Court of Appeals. *United States v. Dion*, 752 F.2d 1261 (1985); *United States v. Dion*, 476 U.S. 734 (1986). The United States did so in order to maintain a cession distinction in *Solem* essential to its argument there supporting original reservation boundaries. Moreover, in other litigation also pending at the same time, and also involving the 1858 Yankton Sioux reservation and the 1894 Yankton Sioux cession act, the United States acknowledged that this Court's decision in *DeCoteau* considered "a similar and contemporaneous

cession agreement" with "the same language" and "purpose." BUS, Co. Pet. App. at 166a. Significantly, Article XVIII of the 1858 treaty that the United States has now insisted is so important, was not mentioned in any of this.

ARGUMENT

A. A Review of the Arguments Previously Presented and Rejected in This Court Establishes Clear Principles That Undermine the Opinion of the Panel Majority.

> Now, this principle that Congress did not intend to disestablish the Reservations is not one that the government has made up out of *whole cloth*. It is supported both by history and by the previous decisions of this Court.

Office of Solicitor General, Tr. at 22, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562) (emphasis added).

1. *Seymour v. Superintendent*, 368 U.S. 351 (1962). A disestablishment issue was first presented to this Court in *Seymour*. Although we now know that the 1906 Colville Act at issue in that case was one in a series of surplus land statutes enacted pursuant to the General Allotment Act of 1887 (Dawes Act) – a routine matter for Congress by 1906 – neither the General Allotment Act of 1887 nor the limited legislative history of the 1906 Act played any real role in the resolution of the question. Act of February 8, 1887, 24 Stat. 388. The *Seymour* opinion does not cite the

General Allotment Act or the legislative history of the 1906 Colville Act. The briefs are similarly silent with respect to the General Allotment Act and the few citations to the 1906 legislative history are set forth almost as an afterthought.

In short, *Seymour* was decided *almost* without the benefit of any historical perspective. "Almost" is used because, although neither the General Allotment Act nor the legislative history of the specific act in question played any role in the decision, Petitioner Seymour did rely on the contrast between the 1906 Act and the earlier 1892 "public domain" legislation that concededly disestablished the North Half of the Colville Reservation. Pet. Br. at 10, *Seymour* (No. 62). At best, this was a limited perspective, but certainly one that benefited Petitioner by simple contrast. More important matters were not briefed, i.e. the argument that the public domain format of the 1892 Act was the result of a refusal by Congress to ratify a previously negotiated 1891 cession agreement due to the questionable nature of the title to the Colville Executive Order Reservation and the argument that the language was added to deal with a congressional concern that undesirable precedent might be established. *Antoine v. Washington,* 420 U.S. 194, 216 (1975) (Rehnquist, J., dissenting); S. Rep. No. 664, 52d Cong., 1st Sess. (1892). *See also U.S. v. Pelican,* 232 U.S. 442 (1914). In any event, it is doubtful whether any of the above would have altered the views of the United States, which argued in support of the reservation boundaries of the South Half of the

Colville Reservation ("Solicitor General has urged this construction upon the Court"). *Seymour*, 368 U.S. at 357.

The Solicitor General's three page argument was based predominantly on the 1948 statutory definition of Indian country which, of course, begs the question. It was also based upon *subsequent* congressional recognition, primarily in 1956, that the reservation continued to exist. BUS, Co. Pet. App. at 3a. Neither the General Allotment Act nor the historical perspective of the 1906 Act played any role in the brief for the United States. In this light, *Seymour* concluded, without further citation, that:

> The Act did no more than *open the way for non-Indian settlers* to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.

Seymour, 368 U.S. at 356 (emphasis added).

The United States later seized on this statement from *Seymour* and tied it to the General Allotment Act of 1887 (which, as previously noted, was not even mentioned in *Seymour*). In effect, the United States attempted to attribute to both *Seymour* and the General Allotment Act, a new congressional plan or purpose consistent with a new argument that no surplus land statute, passed pursuant to the General Allotment Act of 1887, was ever intended by Congress to disestablish portions of Indian Reservations – a

"whole cloth" argument: the revisionist theory of the General Allotment Act.[2]

The United States focused on the General Allotment Act of 1887 for more than one reason. Prior to that time, Congress routinely utilized treaties, cession agreements and other similar arrangements, some of which contained allotment provisions, to disestablish reservations and open territories throughout the United States to settlement for decades:

> [t]he policy of the Government from its earliest days has been to restore Indian reservations or portions thereof to the public domain as the exigencies of advancing population required it. . . .

H.R. Rep. No. 791, 50th Cong., 1st Sess. at 3 (1888). No one had ever attempted to even formulate an argument that Congress never intended these actions to disestablish the limits or boundaries of Indian reservations. If similar cession agreements, passed subsequent to 1887, were not intended to have the same effect, the General Allotment Act of 1887 was the only point in history that Congress could have even arguably intended to have altered such a fundamental historical process. This is especially so in the absence of some affirmative evidence that Congress specifically intended to depart from that historical format, either generally or in a certain case. (The

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[2] *See* the "whole cloth" disclaimer noted *supra* at 5

United States could not produce such evidence at the time – or, as a matter of fact, ever. And it will not do so in this case.) The first opportunity for the United States to advance the new revisionist theory of the General Allotment Act argument in this Court came in *Mattz v. Arnett, supra.* BUS, Co. Pet. App. at 14a-15a.

2. *Mattz v. Arnett,* 412 U.S. 481 (1973). Although the United States argued forcefully for the broad sweep of *Seymour* tied to the General Allotment Act, this argument met with only limited success in *Mattz.* BUS, Co. Pet. App. at 12a-14a. The history of the Klamath River Reservation at issue in *Mattz* was so tortious and fact specific, isolated and atypical, that the *Mattz* dicta regarding the General Allotment Act, while all that the United States could have hoped for, did not really seem pivotal to the decision.

Certainly, the United States repeatedly told the *Mattz* Court:

> The Act of 1892 can properly be understood only in light of the *General Allotment Act* which Congress had recently passed.
>
> In our view, the Act of June 17, 1892, can properly be understood only in light of two considerations: (1) what Congress had done five years earlier in the *General Allotment Act*. . . .

> *The policy of the Act* was to continue the reservation system and the trust status of Indian land. . . .
>
> This Court's more recent decision in *Seymour v. Superintendent,* 368 U.S. 351, is, in our view, controlling here. . . .

BUS, Co. Pet. App. at 10a, 14a, 24a (emphasis added). *See also, id.* at 11a, 15a n.8.

And at oral argument, the United States squarely placed this issue "into a little bit of historical perspective":

> This same policy is recognized more recently by this Court in *Seymour v. Superintendent.* . . .

Tr. at 19-20, *Mattz* (No. 71-1182). *See also, id.* at 13, 14, 15, 21.

At the same time, to shore up this new General Allotment Act argument and supplement this "little bit" of historical perspective for the Court, the United States also discussed certain statutes that concededly disestablished Indian reservations. According to the United States, the Court could, by contrast, look to these examples in determining when congressional action was really intended to disestablish an Indian reservation – an instant historical perspective. BUS, Co. Pet. App. at 18a-19a. Following Petitioner's lead in *Seymour,* and especially in light of this aspect of the *Seymour* opinion, the controlling example cited by the United States of a congressional mandated

disestablishment was the 1892 *Colville* statute, where the operative language restored the north half of the reservation to the public domain. As the United States told this Court in *Mattz,* among other things:

> This Court's more recent decision in *Seymour v. Superintendent,* 368 U.S. 351, is, in our view, *controlling* here. . . . In holding that the Act did not terminate the reservation there at issue, the Court emphasized the absence from the Act of language abolishing the reservations or "restoring that land to the public domain" (368 U.S. at 355).

BUS, Co. Pet. App. at 24a (emphasis added).

Other examples were also listed by the United States to support this "by contrast" argument, including a typical cession. *Id.* at 18a-19a (the *cession* example merits special attention *infra*).

At oral argument, the United States repeated the "by contrast" point:

> MR. SACHSE . . . In closing, since I assume I am out of time, I refer the Court to page 17 of our brief where we have samples of language that Congress used when it did want to discontinue a portion of a reservation.

Tr. at 20-21, *Mattz* (No. 71-1182).

(Except for the cession example, the text *infra* establishes that the others on the list were representative of atypical situations encountered by Congress only on rare occasions and decades apart.)

Without question, the *Mattz* opinion reflects both arguments made by the United States. First, with respect to the General Allotment Act:

> Its policy was to continue the reservation system and the trust status of Indian lands, ... See § 6 of the General Allotment Act, 24 Stat. 390; United States Department of the Interior, Federal Indian Law 115-117, 127-129, 776-777 (1958). . . .
>
> . . . This Court unanimously observed in an analogous setting in *Seymour, id.*, at 356, . . .

Mattz, 412 U.S. at 496, 497.

Secondly, with respect to the "by contrast" argument, the Court in *Mattz* noted:

> More significantly, throughout the period from 1871-1892 numerous bills were introduced which *expressly* provided for the termination of the reservation and did so in unequivocal terms. . . .
>
> Congress has used clear language of express termination when that result is desired. See, for example. . . .

Id. at 504, n.22 (emphasis added).

Two years later, this Court was actually presented with a typical surplus land statute specifically patterned and enacted pursuant to the terms of the General Allotment Act. With the supporting documentation of both the specific act as well as the General Allotment Act, the General Allotment Act

dicta in *Mattz* did not dissuade the Court, including the author of the *Mattz* opinion, from correctly concluding that surplus land statutes passed pursuant to the General Allotment Act were also intended and routinely passed by Congress to disestablish Indian reservations. *DeCoteau v. District County Court,* 420 U.S. 425, 447-449 (1975). Predictably, the United States again argued forcefully for a different result in *DeCoteau.*

3. *DeCoteau v. District County Court,* 420 U.S. 425 (1975). In *DeCoteau,* the surplus land statute at issue was one of eight similar agreements in a cession format jointly ratified in an 1891 Appropriation Act. Each of these agreements was specifically tailored to the provisions in the General Allotment Act, which had recently been passed after nearly a decade of focused debate. For these two reasons, fortuitous in retrospect, the historical record consisted of hundreds of pages directed to this aspect of the General Allotment Act (Section 5) and the effect the cession agreements were understood and intended to have.

Moreover, for the first time, all of this primary documentation was excerpted and presented to the *DeCoteau* Court in several hundred pages of briefs, setting forth a complete and proper historical perspective. That perspective established that although simple allotment per se (Section 6 of the General Allotment Act) was only intended to disestablish reservations at *some* point in the foreseeable future, a separate and distinct surplus land statute, in a cession format, opening the reservation or a portion

thereof to settlement pursuant to Sec. 5 of the General Allotment Act, was intended to disestablish the affected reservation *pro tanto* (on the date of the opening set forth in the Presidential Proclamation). This was in precisely the same manner that pre-1887 cessions had disestablished reservations for decades, when Congress and/or the President authorized similar legislation.

The United States elected to ignore the force of this documentation, and instead urged the *DeCoteau* Court to recognize the continuing existence of the original reservation boundaries on the basis of *Seymour* and *Mattz* and the United States' revisionist theory of the General Allotment Act. While agreeing that the focal point of the issue had to be the General Allotment Act of 1887, the United States pressed the point that *Seymour* and *Mattz* were both openings pursuant to that act, and that no act pursuant to the General Allotment Act was ever intended to effect reservation disestablishment except at some future point in time. (Again, as in the Brief for the United States in *Mattz*, the United States blurred the distinction between allotment per se (Section 6 of the General Allotment Act) which eventually resulted in some non-Indian ownership within the limits of Indian reservations, but was never intended to immediately disestablish the reservations, and surplus land statutes enacted pursuant to Sec. 5 of the General Allotment Act,

which repeatedly accomplished this result). BUS, Co. Pet. App. at 37a, 38a, 39a, 40a.[3]

In addition, the United States submitted a series of very sophisticated arguments drawn from little scraps of language found in *Seymour* and *Mattz* to support this general proposition. No degree of sophistication, however, could overcome the problem the United States never addressed: namely, the fact that all of the contemporary historical evidence irrefutably pointed to the opposite conclusion. *DeCoteau,* 420 U.S. at 432, 434, 436, 438 and 441.

Further, the cession format utilized by Congress in previous decades – with the end result never questioned in terms of reservation boundaries – was only slightly modified at this point in time (1887 through the early 1900's). As a result, the United States could only argue that the cession format itself was probative of nothing because it was not within the list of self-serving "by contrast" examples the United States *now* said Congress utilized when Congress "clearly" intended to effectuate this result (the list noted previously was compiled by the United States and noted in *Mattz,* 412 U.S. at 497, n.19). In the original version of the list presented to the Court in *Mattz,* the United States had included representative cession language. BUS, Co. Pet. App. at 18a-19a. When that cession example did not appear in the

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[3] *See also,* Tr. at 11, 13, 17, 21, *Erickson v. U.S ex rel. Feather,* (No. 73-1500), *decided with DeCoteau*

Mattz opinion, the United States omitted any mention of this fact to the Court, simply adopted the *Mattz* list and argued throughout *DeCoteau* that the cession language was meaningless. *Id.* at 40a-41a.[4]

Even without a specific historical point of reference, it is difficult to believe that the *DeCoteau* Court would have found this argument credible when actually presented with a real cession agreement. When all of the *DeCoteau* documents conclusively established that the *DeCoteau* cession format was still the rule at this point in time *i.e.*, *after* the General Allotment Act, rather than the exception, this argument was soundly rejected. Cession terminology was "precisely suited" to disestablishment and the remainder of the sophisticated arguments of the United States were noted and rejected for that reason. *DeCoteau*, 420 U.S. at 445.[5]

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[4] At the time, the State of South Dakota evidently overlooked this aspect of the original list and the fact that the typical cession example submitted by the United States in the Brief for the United States in *Mattz* (as "direct and unambiguous language" of disestablishment) was actually ratified in the same statute as the cession agreement presented in *DeCoteau* BUS Co Pet. App at 40a. To the extent that the United States was making the opposite argument in *DeCoteau*, this oversight was fortuitous for the United States in that this contradictory position was never brought to the Court's attention

[5] As the Court in *DeCoteau* noted, as recently as 1963, the United States had joined with South Dakota in the argument that cessions disestablished reservations. Joint Brief of Respondent State of South Dakota and United States as *Amicus*

(Continued on following page)

4. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). The United States subsequently resisted the force of *DeCoteau*. In 1977, in *Rosebud*, this Court considered three Sec. 5 surplus land statutes considered by Congress a decade after the *DeCoteau* surplus land statutes were passed. The United States again argued that, after adopting the General Allotment Act, Congress never intended this type of statute to disestablish portions of Indian reservations. As in the past, reliance for this argument was placed almost entirely upon *Seymour* and *Mattz*. In its brief, the United States specially emphasized that *Mattz* noted:

> Placing the 1892 Act into the historic context of *the General Allotment Act of 1887*, 24 Stat. 388, the [*Mattz*] Court further observed that the Allotment Act "permitted the President

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Curiae at 7, *DeMarrias v. State*, 319 F 2d 845 (8th Cir. 1963) (No 17200). *DeCoteau*, 420 U.S at 443

Not, surprisingly, in every way that is arguably significant, the Yankton documents mirror and reflect the same terminology, discussions, considerations, policies, and generalities presented in *DeCoteau*. In fact, as Respondent Southern Missouri Waste Management District pointed out, the Yankton Commissioners repeatedly referred specifically to the terms of the Sisseton Agreement. Br. of Resp't District at 18-19. *See also* South Dakota Representative Pickler's remarks in the Congressional Record ("same kind of a treaty we have always made" . . "procure these lands in the same way" "we make no departure from our past policy" "just as all other cessions of land" .) *Id.* at 36-37. As a result, in both instances the Commissioner of Indian Affairs and the Secretary of the Interior also acknowledged that both reservations were "restored to the public domain." *Id* at 9. *See generally Hagen* 510 U.S at 412-414 (public domain)

> to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to *continue the reservation system* . . .

BUS, Co. Pet. App. at 65a (emphasis in original text).

In its discussion of *DeCoteau,* the United States failed to mention the role played by Sec. 5 of the General Allotment Act and the cessions in the *DeCoteau* process. *Id.* According to the United States, *DeCoteau* was important primarily because of the differences between the cession act there and the *Rosebud* legislation, i.e., the unilateral nature of the congressional action in *Rosebud* and the uncertain payment in trust for the *Rosebud* land.

At oral argument, the United States repeatedly stressed its revisionist theory of the General Allotment Act. The United States maintained that after this act, Congress never intended reservation disestablishment. *DeCoteau* was mentioned only in passing and then primarily to somehow support continued reservation boundaries throughout this period. Tr. at 20, 21, 27, 29, *Rosebud* (No. 75-562).

The *Rosebud* Court proceeded, in the most definitive opinion to date, to squarely address each and every argument – sophisticated arguments to be sure (and there were many) – advanced in support of the Court restoring the original boundaries of the Rosebud Reservation. Although one or two minor exceptions might exist, a careful reading of *Rosebud,* together with *DeCoteau* as recognized historical

background, establishes that the United States, the Yankton Sioux Tribe and supporting *Amici*, can not advance any argument of substance that has not already been answered. (And, as in *DeCoteau*, the public domain concept, whether expressed on the face of the act or in the legislative history, was still important in *Rosebud* and equated with reservation disestablishment.)

Unquestionably, as time went on, the cession format of the earlier period was modified, but these changes in format reflect no change in congressional intent. Thus, it ultimately mattered little that the 1904 *Rosebud* Act was technically not a "cession." As the Court in *Rosebud* explained:

> As a matter of strict English usage, petitioner is undoubtedly correct; "cession" refers to a voluntary surrender of territory or jurisdiction, rather than a withdrawal of such jurisdiction by the authority of a superior sovereign. But as Mr. Justice (then Judge) Holmes commented, we are not free to say to Congress: "We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson v. United States*, 163 F. 30, 32 (CA1 1908). . . .
>
> The use of the word "cession" in the 1904 Act, which was not consented to by the required extraordinary majority of the Tribe, does not make the meaning of the Act ambiguous . . .

> The word is technically misused but the meaning is quite clear.

Rosebud, 430 U.S. at 597.

In the instant case, of course, the word "cession" is not technically misused. And the United States' comments regarding real cessions in *Rosebud* (alternatively, in an attempt to distinguish *Decoteau*) bear repeating now:

> The court of appeals, however, failed to recognize the *crucial difference* that in *DeCoteau* the United States itself purchased the land in the reservation pursuant to an agreement with the Indians; this, the Court held, restored the land to the public domain and extinguished the reservation. 420 U.S. at 446-447.

Memorandum of the United States at 13, *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977) (No. 75-562) (emphasis added).

> The 1891 Act had ratified an agreement in which the Tribe expressly *ceded* to the United States all its "right, title and interest" in the land for a lump sum. The Court contrasted this transaction with the Acts involved in *Seymour* and *Mattz*. . . . The *differences* identified by the Court are *important* to the present case. The 1891 Act was a *negotiated agreement* with the Tribe, whereas the Acts involved in *Seymour* and *Mattz* were "unilateral" Acts of Congress not agreed to by the Tribes. . . .

> The 1891 Act was a *straightforward cession for a sum certain in amount. . . .* These *distinctions* led to the conclusion that the Lake Traverse Reservation was extinguished and the land restored to the public domain. . . .
>
> In *DeCoteau* (but not in *Seymour* or *Mattz*) the *United States itself purchased the land in the Reservation pursuant to an agreement with the Indians; this, the Court held, restored the land to the public domain and extinguished the Reservation.*

BUS, Co. Pet. App. at 66a, 67a (emphasis added).

The United States also reminded this Court of the 1934 Interior Department Opinion which they continued to rely upon for *traditional* confirmation that real *cessions disestablished reservations*:

> In this way the *exterior boundaries* of a reservation were further reduced. The lands thereby separated from a reservation were no longer looked upon as being part of that reservation.

54 Interior Dec. 560 (1934) (emphasis added) cited and quoted in part in Memo. of the United States at 19-21 *Rosebud* (No. 75-562) and BUS, Co. Pet. App. at 79a ("The Secretary noted that many reservation lands had been ceded for a sum certain and concluded that '[t]he lands thereby separated from a reservation were no longer looked upon as being a part of that reservation'" (54 I.D. at 560)). *Id.*

It is beyond dispute that both the Sisseton and the Yankton reservation agreements are within the purview of this analysis. For this reason, as the United States pointed out, the list in the 1934 Opinion included some 26 "reservations." It did not include *either* the Sisseton or Yankton cession. BUS, Co. Pet. App. at 80a.

In oral argument, the United States reiterated, by negative implication, this same dominant point:

> [W]henever Congress *without* a binding agreement opens lands to white settlers, it does *not* pay for them and does *not* guarantee any payment but only agrees to act as trustee for future uncertain sales and leaves the property interest in the Indians – as they did in this case – that act does *not* remove the lands from the boundaries of the Reservation.

Tr. at 22, *Rosebud* (No. 75-562) (emphasis added).

A few minutes later, the same cession distinction was stressed in a different context:

> [I]n *DeCoteau,* which distinguishes both cases in a case where sale was made for a sum certain and an agreement was made, as counsel for the Tribe has discussed. . . .

Id. at 28.[6]

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[6] *See also* Rosebud Sioux Tribe's Brief in *Rosebud* that tracks this position and confirms that same understanding

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5. *Solem v. Bartlett,* 465 U.S. 463 (1984). In *Solem,* the United States combined and restated so many variations of earlier arguments that even a summary review is difficult to present here. Moreover, since the United States did not participate in oral argument, that source is not available. In short, however, it can be fairly stated that the United States in *Solem* argued whatever was necessary to resist reservation disestablishment.

Most important for the present case are the concessions of the United States regarding cessions which were adopted in the Court's Opinion. *Solem,* 465 U.S. at 470, 473 n.15, 474, 476, 478. The State addresses these points. State's Br. at 9, 15-16, 26 n.15.

For example, the United States said:

> [C]*ritically different* from the situation in *DeCoteau* and *Rosebud* in at least the following respects: (1) the relevant legislation contains *no* language of "*cession*"; (2) there was

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regarding the traditional view that real cessions disestablished reservations Tribe's Brief at 12, 13 and 16, *Rosebud* (No. 75-562). Counsel for the Rosebud Sioux Tribe has decades of experience in this area of the law At oral argument, he unequivocally stated:

> A cession is a sale. It is a high-class sale. It is a sale between sovereigns . . The Court assumed there was a cession. That is the fundamental error of the Court Below

Transcript of Oral Argument at 12-13, *Rosebud,* 430 U S 584.

> *no* prior tribal agreement to cede the relevant area. . . .

Br. for the United States as *Amicus Curiae* Supp'ng Resp't (opposing Pet. for Cert.) at 4 n.3, *Solem* (No. 82-1253) (emphasis added).

On the merits, the cession theme was restated with unmistakable clarity:

> The *critical* question remains whether the statute invoked worked an immediate and irrevocable cession. . . .
>
> To be sure, as *DeCoteau* and *Rosebud* illustrate, there are instances in which a Reservation *must* be found to have been irrevocably terminated or diminished. . . . In the climate of the times, the *only meaningful question* is whether the legislation meant to accomplish a *present, unequivocal* and *irrevocable* transfer of Reservation lands from the Tribe to the United States.
>
> The *critical* fact in all these cases is that Congress exacted a *present and total surrender of all tribal interest* in the ceded land in return for an *unconditional commitment* by the United States to an agreed payment. . . .
>
> [T]he clear line between *outright* cession and mere opening up of tribal lands was not always observed. . . . But we do not read *Rosebud* as erasing the *traditional distinction.*
>
> What is relevant, however, is that, at the end of the day, *no cession resulted.*

BUS, Co. Pet. App. at 103a, 109a, 110a, 111a, 113a, 122a (emphasis added).

In this light, it is not surprising that *Solem* repeatedly made these same cession observations.

6. *United States v. Dion,* 476 U.S. 734 (1986). In order to maintain the cession distinction essential to the argument in *Solem,* the United States had to make similar concessions in other cases then pending. As a result, at about the same time (1984), the United States recognized that cession disestablishment was the dominant factor in the history of the 1858 Yankton reservation and further, that the 1858 Yankton reservation had in fact been *disestablished* by the 1894 Yankton cession act at issue in the present case. Opening Brief for the Federal Appellant at 16, 17 n.10, *United States v. Dion,* 752 F.2d 1261 (8th Cir. 1985). This submission by the United States was made in the Eighth Circuit Court of Appeals sitting *en banc* in conjunction with the appeals of federal prosecutions of Yankton Sioux tribal members and others for unlawfully killing bald eagles, as the United States has acknowledged. Brief for the United States as *Amicus Curiae* in Support of Plaintiffs-Appellees at 18 n.8, *Yankton Sioux Tribe v. Southern Missouri Waste Dist.,* 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647).

In *Dion,* in the opening brief, the United States correctly identified the relationship between the 1858 Yankton cession treaty and the 1894 Yankton cession act under a subheading disputing a treaty "right to

hunt eagles to extinction" (one Yankton Sioux tribal member had allegedly killed twenty bald eagles in the course of a year). Opening Brief for the Federal Appellant at 16, 17 n.10, *Dion,* 752 F.2d 1261; Transcript at 18, 27, *Dion,* 476 U.S. 734. In addition, and in accord with the cession disestablishment submission in *Solem v. Bartlett,* 465 U.S. 463 (1984), the United States specifically cited with approval the controlling federal and state decisions that recognized and held that the 1858 Yankton reservation was disestablished by the 1894 Yankton cession act:

> In 1858, the Yankton Sioux negotiated a treaty with the United States in which they "ceded and relinquished" to the United States all but 400,000 acres of the lands claimed by them. Treaty with the Yankton Sioux, Art. I, 11 Stat. 743. (April 19, 1858)[10] . . . .[10] In 1894, Congress ratified an agreement with the Yankton Sioux which further diminished the size of their reservation. Act of August 15, 1894, § 12, 28 Stat. 286, 314. See *Weddell v. Meierhenry,* 636 F.2d 211 (8th Cir. 1980); *State v. Williamson,* 211 N.W.2d 184 (S.D. 1973).

Opening Brief of the Federal Appellant at 16, 17 n.10, *Dion,* 752 F.2d 1261.

The two disestablishment cases cited by the United States are both important. First, in *Weddell v. Meierhenry,* 636 F.2d 211 (8th Cir. 1980), the parties and the federal court proceeded on the basis that the reservation had been disestablished in considering a

dependent Indian community jurisdictional claim involving the City of Wagner, South Dakota, which is within the 1858 Yankton reservation. *See* Brief of Cities at 3-6.[7] In the process of rejecting this dependent Indian community claim to preclude state jurisdiction, in *Weddell* the federal panel, without dissent, specifically noted that the disestablishment issue had been decided and conceded:

> The Supreme Court of South Dakota has twice determined that the original Yankton Indian Reservation had been diminished by an Act of Congress. *Wood v. Jameson*, 81 S.D. 12, 130 N.W.2d 95, 99 (1964); *State v. Williamson*, 211 N.W.2d 182, 184 (S.D. 1973). Appellant does not challenge these holdings in this appeal.

Weddell, 636 F.2d at 213 n.2.

Second, in *State v. Williamson*, 211 N.W.2d 182 (S.D. 1973), which also involved criminal offenses in the City of Wagner, South Dakota, as well as in the

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[7] The criminal activity in *Weddell* originated in a burglary in Wagner, South Dakota, involving the theft of rifles and shotguns by several Yankton Sioux tribal members and other individuals and the armed takeover of a nearby pork plant. The Supreme Court of South Dakota decided the initial appeals in *State v. Winckler*, 260 N.W.2d 356 (S.D. 1977). In the *Winckler* opinion, a unanimous State Supreme Court reiterated that it had previously held the Yankton reservation to be "disestablished" in *State v. Williamson*, 211 N.W.2d 182 (S.D. 1973) and further cited *DeCoteau v. Dist. County Ct.*, 211 N.W. 843 (1973), *aff'd*, 420 U.S. 425 (1975). *Winckler*, 260 N.W.2d at 360.

City of Lake Andes, South Dakota (both within the 1858 Yankton reservation), the Supreme Court of the State of South Dakota reiterated and restated its longstanding cession jurisprudence regarding "outright" cessions. Later that same month, the South Dakota Court again confirmed this cession jurisprudence and the disestablished status of a similar cession in *DeCoteau v. Dist. County Ct.*, 211 N.W.2d 843 (S.D. 1973), which was subsequently affirmed by this Court. *DeCoteau*, 420 U.S. 425 (1975).[8]

Eight other briefs were filed in the Eighth Circuit Court of Appeals in *Dion*. No one disagreed with the United States' disestablishment assessment of the 1894 Yankton cession act or the controlling federal and state law.

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[8] Judge Wollman, a member of the State Supreme Court at the time, concurred specially, noting:

> [T]he Act of 1894, 28 Stat 286, expresses a congressional determination to terminate the reservation status of the portion of the reservation ceded, sold, relinquished and conveyed to the United States by the Yankton Tribe.

State v. Williamson, 211 N.W.2d 182, 184 (S.D. 1973) In the instant case, Judge Wollman recused himself

The United States has now belittled *Williamson* and all state and federal Yankton disestablishment precedent prior to "*Solem* and *Hagen*," without explaining why *Seymour*, *Mattz*, *DeCoteau* and *Rosebud* do not also figure in this equation. Brief for United States as *Amicus Curiae* in Support of Plaintiffs-Appellees at 17, *Yankton Sioux Tribe v. Southern Missouri Waste Dist.*, 99 F.3d 1439 (8th Cir 1996) (No. 95-2647)

The *en banc* majority opinion in the Eighth Circuit in *Dion* acknowledged this 1894 Yankton cession act disestablishment in the following fashion, and the dissent did not disagree with this conclusion:

> In 1858, the Yankton Sioux and the United States negotiated a treaty in which the Yankton Sioux ceded and relinquished to the United States all lands claimed by the tribe except for a four hundred thousand acre tract of land[7] . . . [8] The Supreme Court of South Dakota has determined that an act of Congress in 1894 diminished the size of the original reservation. *State v. Williamson*, 87 S.D. 512, 211 N.W.2d 182, 184 (1973); *Wood v. Jameson*, 81 S.D. 12, 130 N.W.2d 95, 99 (1964). *See Weddell v. Meierhenry*, 636 F.2d 211, 213 n.2 (8th Cir. 1980).

Dion, 752 F.2d at 1263 & n.7 (8th Cir. 1985) (footnote omitted).[9]

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[9] The *en banc* court supplemented the citations of the United States to the disestablishment cases of *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980) and *State v. Williamson*, 211 N.W.2d 182 (1973) with this reference to *Wood v. Jameson*, 130 N.W.2d 95 (1964) (The court of appeals in *Weddell* had also cited *Wood*) In a habeas corpus case, the South Dakota Supreme Court in *Wood* rejected an Indian country claim of federal jurisdiction for a crime of rape that occurred in Lake Andes, South Dakota, which is within the 1858 Yankton reservation. *Wood*, 113 N.W.2d 95. The *Wood* court, citing numerous state court decisions, distinguished *Seymour v. Superintendent*, 368 U.S. 351 (1962) (as this Court did later in *DeCoteau*) on the basis of the nature of this outright 1894 cession *Wood v. Jameson*, 130 N.W.2d at 98-99. The *Wood* court also relied on this

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State v. Williamson, 211 N.W.2d 182 (S.D. 1973); *Wood v. Jameson*, 130 N.W.2d 95 (S.D. 1964) and *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980) all make clear that the 1858 Yankton reservation has been disestablished and that references to the present Yankton reservation are limited to the land still held in trust for the Yankton Sioux Tribe or tribal members. *See also DeCoteau*, 420 U.S. at 446. And it was in this light that the Solicitor General admitted in this Court that the "reservation" nature of the violations in *Dion* were "essentially undisputed." Brief for the United States at 15 n.19, *Dion*, 476 U.S. 734. *See also* Respondent's references to "Indian land" and "his reservation." Transcript at 20-21, *Dion*, 476 U.S. 734.

The opinion of this Court in *Dion* noted early on that the Eighth Circuit simply assumed that the birds were killed on the "reservation" and that the same assumption was made in this Court. *Dion*, 476 U.S. at 735 & n.1. With this assumption, a unanimous Court did not otherwise directly or specifically address the 1894 Yankton cession act issue. However, in the course of discussing the history of the 1858 Yankton reservation, the Court in *Dion* did cite *Wood*

Court's venerable precedent in *United States v. Pelican*, 232 U.S. 442 (1914) and *Perrin v United States*, 232 U.S. 478 (1914) (liquor provision to apply "on or off a reservation") and concluded that the "purpose" of Congress was to "disestablish the reservation." *Wood v. Jameson*, 130 N.W.2d at 97-99. See also discussion of *Perrin* in State's Br. at 33

in the text of the opinion, in recognition of the fact that the area reserved in 1858 was initially a "legally constituted Indian reservation." *Dion*, 476 U.S. at 737 (citing *Wood*, 130 N.W.2d 95). *See* discussion of *Wood supra* at Note 9. On the very same page in *Wood* that recognized the initial legitimacy of the 1858 Yankton reservation, the *Wood* opinion begins its discussion of the disestablishment of the 1858 Yankton reservation occasioned by the passage of the 1894 Yankton cession act (two sentences later). *Wood*, 130 N.W. 2d at 97. As noted above, the *Wood* analysis included quotations of the cession language of the 1894 cession act and early precedent of this Court, such as *United States v. Pelican*, 232 U.S. 442 (1914) and *Perrin v. United States*, 232 U.S. 478 (1914). *Wood*, 130 N.W. 2d at 97-99. Because the Eighth Circuit in *Dion* expressly cited *Wood* for this disestablishment holding, the reference to *Wood* in this Court's opinion should be viewed in this light.

One final point with respect to the views of the United States in *Dion* regarding the 1858 Yankton treaty, the 1894 Yankton cession act and subsequent acts of Congress. Apart from the previous inconsistent disestablishment concession of the United States with reference to the 1894 Yankton cession act (and all other cessions), the strained argument the United States now submits should also be examined in the context of the views the United States expressed in *Dion* regarding statutory construction and Indian treaties generally. For example:

> [T]he general circumstances of treaty negotiation in the nineteenth century which, in our view, would not have led any of the parties even to form an intention on this issue. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978), the Supreme Court emphasized that treaties with the Indians "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them." The historical context of Indian treaty negotiation demonstrates that neither the United States nor the Indian signatories ever contemplated. . . .

Opening Brief for the Federal Appellant at 17-18, *Dion*, 752 F.2d 1261.

> This Court has emphasized that Indian treaties 'cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.' *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

Brief for the United States at 19, *Dion*, 476 U.S. 734.

> It is, of course, axiomatic that a statute must be interpreted in light of the purposes Congress sought to achieve. See, *e.g.*, *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 118 (1983).

Reply Brief of the United States at 7, *Dion*, 476 U.S. 734.

> The statute should be construed in order to effectuate its purposes.

Transcript at 17, *Dion*, 476 U.S. 734.

These are important concepts. Their significance is not undermined here simply because the United States now chooses to advance an argument that is at odds with acknowledged congressional assumptions and overall congressional purposes.

7. *Yankton Sioux Tribe v. South Dakota*, 796 F.2d 241 (8th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1986). Apart from *Dion*, the United States has only had one opportunity since *DeCoteau* (but before the present litigation) to tell this Court specifically about the *Yankton* statute and how it compared to the *DeCoteau* statute. In that instance, involving a lakebed, the cession comparison is also telling:

> [T]he United States' right to control Lakes Andes and its bed, to the exclusion of the Yankton Sioux Tribe, is in any event secured by the 1892 Cession Agreement. . . . First, Article I is framed in terms that this Court has repeatedly characterized as "express language of cession." *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, No. 83-2148 (July 2, 1985), slip op. at 15 n.19; *Solem v. Bartlett*, 465 U.S. 463, 469 (1984). In *DeCoteau v. District County Court*, 420 U.S. 425, 445 (1975) (emphasis added), this Court, in considering *a similar and contemporaneous cession* agreement, found that *the same language* was "precisely suited" to the

> purpose of conveying to the United States, "for a sum certain, *all of* [*the Indians*'] interest in *all* of their unallotted lands."
>
> Second, the retention of the lakebed by the Tribe would have been inconsistent with the *purposes* of the 1892 Cession Agreement. Those *purposes* consisted not only of opening additional lands for non-Indian settlement, but also of paving the way for the anticipated end of the tribal way of life. . . .

BUS, Co. Pet. App. at 165a, 166a (emphasis on all in original).

While it remains to be seen exactly what the United States might tell this Court now, the County would submit that in this excerpt in the 1986 Brief in Opposition, the United States has already said everything worth saying ("a similar and contemporaneous cession"). This *Yankton* lakebed litigation was pending for over a decade. Although reservation disestablishment was not decided, the Yankton cession agreement was central to the arguments for the United States and other parties. As such, it was thoroughly reviewed and discussed in all respects. At that time, Article XVIII of the Yankton agreement, viewed in context, was not noteworthy and did not even merit special attention in the argument of the United States.

Not surprisingly, the position of the United States on this issue was subsequently modified to one that now supports the recognition of the original

Yankton reservation. In the court of appeals, Article XVIII figured prominently in the new argument.

8. *Hagen v. Utah,* 510 U.S. 399 (1994). *Hagen* reflects the most recent views of this Court in resolving disestablishment issues. Due to the history of the Utah legislation, the United States devoted most of its arguments in *Hagen* – naturally in favor of a recognition of original reservation boundaries – to "public domain" terminology. These arguments were generally rejected in *DeCoteau.* Again, in *Hagen* this Court squarely rejected them.

The United States also strongly argued that a cession and sum certain agreement was broadly understood to effect disestablishment:

> Language that "[e]xplicit[ly] refer[s] to *cession*" or otherwise "evidence[es] the present and total surrender of all tribal interests" in the opened area suggests that Congress *meant to sever it* from the reservation. *Ibid.* When such language is buttressed by an unconditional commitment to compensate the tribe, "there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished."[14] [14] In the presence of both of those factors, the Court found a reservation to have been extinguished in *DeCoteau v. District County Court,* 420 U.S. 425, 431-449 (1975).
>
> But the statute at issue in *Rosebud* contained explicit language of *cession*. . . .

That language does not refer to a "*cession*" or otherwise "evidenc[e] the present and total surrender of all tribal interests" in the opened land. . . . [C]ontrasts sharply with that of the statutes at issue in *DeCoteau* and *Rosebud,* the two recent cases in which the Court has found that reservation boundaries were altered by Congress. See *DeCoteau,* 420 U.S. at 445 (statute provided that the Indians did "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands," Act of Mar. 3, 1891, ch. 543, 26 Stat. 1036); *Rosebud,* 430 U.S. at 596-597 (statute provided that Indians did "hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted." Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254). In sum, the 1905 Act contains neither an "[e]xplicit reference to cession" nor any other "language evidencing the present and total surrender of all tribal interests" in the portion of the Reservation opened to non-Indian settlement. *Accordingly,* under *Solem,* it fails to demonstrate a clear congressional intention to alter the boundaries. . . . [L]anguage demonstrating that Congress provided for the total surrender of all tribal interests in the portions of the Reservation. . . . Act does not refer to any *cession*. . . .

As the *Rosebud* Court explained, a ruling that the Rosebud Sioux Reservation was

> not diminished by the 1904 Act at issue there could only have frustrated congressional intent. The statute used *unequivocal language of cession,* and adopted an agreement of the Indians that unequivocally approved the cession (albeit with modifications approved by only a simple majority of the adult male Indians). . . .
>
> [N]one of the relevant documents . . . uses the *indisputable language of cession* that was a feature of all of the relevant documents in *Rosebud.* Moreover, in our view, the *requirement* in *Solem* that the "understanding" be "widely held" requires *proof* that the Indians shared in an understanding that alteration of the Reservation's boundaries was at hand; the *only* obvious manifestation of such an understanding on the part of the Indians is *an agreement of cession,* like the one approved in *Rosebud.*

BUS, Co. Pet. App. at 138a, 141a n.20, 142a, 143a, 149a, 150a (emphasis added).

Significantly, in this instance the United States also participated in oral argument and made explicit representations as to the effect of the use of cession language:

> MR. MANN: . . . [*T*]*he language of cession.* That seems to be – that phrase seems to be the phrase *Congress used when it intended to alter the boundaries of a reservation.*

> QUESTION: Well, when it intended to alter the boundaries of the reservation by cession. That much is clear.

Tr. at 26, *Hagen* (No. 92-6281).

The County certainly would not attempt to improve upon the gist of this exchange. Nothing more need be said on this point.

9. *Yankton Sioux Tribe v. Southern Missouri Waste District,* 99 F.3d 1439 (8th Cir. 1996). The United States did not participate in this litigation in the district court. In the court of appeals, the United States, as *amicus curiae,* told the court that because the federal government retains jurisdiction over Indian country generally, the continuing integrity of the exterior boundaries of Indian reservations is of "significant import." Br. of the United States at 1, *Yankton Sioux v. Southern Missouri,* 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647). (The United States did not contest the fact that federal jurisdiction had *not* been exercised in this area for over a century).

Moreover, the United States argued, for the first time, that it had a strong interest in protecting "the integrity of reservation boundaries" because of its "special relationship with Indian tribes." *Id.* The strength of this interest presumably overpowered any inclination to present, address, explain or defend any of the previous United States' cession arguments that were plainly inconsistent with continued reservation status, including the *Dion* disestablishment concession. The United States mentioned none of this and

simply noted: "We do not agree with the arguments raised by the County in its brief. They are irrelevant to this case." *Id.* at 19 n.11.[10]

Only two points in the novel argument now advanced by the United States in support of original reservation boundaries are significant at this point in time. First, the commendable concession that this Court's 1914 Yankton decision in *Perrin v. United States*, 232 U.S. 478 (1914), "assumed" disestablishment. *Id.* at 19 n.10. And secondly, that as late as 1985 the United States (and everyone else) was continuing to make this same assumption:

> [T]he United States stated in a footnote in its brief that, based on decisions of state courts in South Dakota, the reservation had been diminished by the 1894 treaty.

Id. at 18 n.8.

The panel majority should have been more reluctant in disregarding this venerable precedent.[11]

---

[10] At oral argument in the companion case of *United States v Greger*, 98 F 3d 1080 (8th Cir. 1996), the United States glossed over the 1894 cession act because, unlike the act in *Hagen*, it did not contain probative public domain language on its face. In *Hagen*, the premise of the argument of the United States was just exactly the reverse: public domain language was meaningless, cession language would have been dispositive. *See* text at 28, *supra*.

[11] Another generic argument that the United States has endorsed and submitted in litigation of this kind promises even more unsettling consequences than the simple reversal of the position of the United States in regard to the 1894 Yankton

(Continued on following page)

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

MATTHEW F. GAFFEY
Charles Mix County
State's Attorney
P.O. Box 370
Lake Andes, SD 57356
(605) 487-7441

TOM D. TOBIN
Counsel of Record
TOBIN LAW OFFICES, P.C.
422 Main Street
P.O. Box 730
Winner, SD 57580
(605) 842-2500

Attorneys for Amicus Curiae

Dated: August 7, 1997

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cession statute. (In light of this Court's precedent, the County has every reason to believe that this Court will squarely reject the revised Yankton cession views of the United States in this case). But the new argument of the United States, submitted subsequent to *Hagen* in the Tenth Circuit and now in the Eighth Circuit Court of Appeals, summarily undermines the effect of all disestablishment precedent on reservation boundaries and would leave local jurisdictions such as Charles Mix County in almost impossible situations.

Because it is beyond the scope of this brief, others have addressed the decisions that recently endorsed this position. *See Ute Indian Tribe v. State of Utah*, 935 F. Supp. 1473 (D. Utah 1996) and *Ute Indian Tribe v. State of Utah*, 114 F.3d 1513 (10th Cir. 1997), where this argument recently received favorable consideration, after *40 months* of needless post-*Hagen* litigation, which is not over yet. *See* Brief of Duchesne County, Utah, and Uintah County, Utah *Amici Curiae*. The County has reproduced the argument itself as the United States submitted it. Co. App. at 1a, *infra*.

Excerpt from Page 17 (Footnote 6) From Brief for United States as Amicus Curiae in Support of Plaintiff's-Appellee's, Yankton-Sioux Tribe v. Southern Missouri Waste Management Dept., 99 F. 3d 1439 (8th Cir. 1997) (95-2647).

* * *

Article I of the 1892 Agreement provides only that "the unallotted lands within the limits the [Yankton Sioux] reservation" are ceded to the United States, and it was only such lands that were covered by the Presidential Proclamation of May 16, 1895. As a result, the State's reliance on Articles I and II of the 1892 Agreement for the proposition that the Reservation was diminished can extend no further than those unalloted lands. The other lands owned by non-Indians on the Reservation presumably were once allotted to tribal members but later sold to non-Indians. The State has pointed to nothing in the 1892 Agreement to suggest that these lands were removed from the Reservation any more than that the allotted lands that remain in Indian ownership were removed from the Reservation. The State's argument in this case, therefore, would yield the anomalous result that some non-Indian land within the Reservation boundaries is part of the Reservation and some is not, which would complicate the jurisdictional maze beyond even that caused by the checkerboard pattern of Indian ownership. Because only Congress may alter reservation boundaries, *see Solen*, 465 U.S. at 470, the size of (and parcels constituting) the Reservation

could not have been affected by subsequent transfer of lands from Indians to non-Indians.

* * *

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1960

No. 8 Misc.

PAUL SEYMOUR, PETITIONER

v.

MERLE E. SCHNECKLOTH, SUPERINTENDENT
OF WASHINGTON STATE PENITENTIARY

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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MEMORANDUM FOR THE UNITED STATES

The Court has requested the view of the United States as to whether the lands involved in the above-entitled case are Indian lands.

The record in this case shows the land involved as follows:

> On the southwest corner of 6th Avenue and Jackson Street (formerly 10th Street) in East Omak, Okewogan County, Washington; that said premises are more particularly described as Lot 9, Block 118 of the government townsite of Omak and situated in Section 36, Township 34, North Range, 26 E.N.M.

According to the records of the Department of Interior, this land is not held in a trust status for any Indian nor is it held by an Indian subject to restrictions against alienation. Nevertheless, it is the position of the Department of Interor, with which the Department of Justice agrees, that the land is "Indian country" as that term is defined in 18 U.S.C. 1151.

18 U.S.C. 1151 provides in pertinent part that Indian country means "all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent and including rights-of-way running through the reservation." The land here is, in our view, "within the limits" of an Indian reservation.

The Colville Reservation, as originally established by executive order in 1872, was bounded on the north by the international boundary and on the south by the Columbia River. See Royce, *Indian Land Cessions in the United States*, Washington Map 1, No. 536. That part of the original reservation approximating the north half was ceded to the United States and the reservation was diminished to approximately the south half in 1892. See Royce, *op cit.*, Washington Map 2, No. 717. While it is true that the Act of March 22, 1906, 34 Stat. 80, made provision for allotments on the diminished reservation and authorized the sale and disposition of the unallotted lands subject to payment of the proceeds of the sales to the Indians, this did not destroy the existence of the reservation. The Department of Interior continued to recognize the entire diminished or "south half" as the Colville

Reservation. The Act of July 24, 1956, 70 Stat. 626, specifically provides in section 1 that "the undisposed-of lands of the Colville Indian Reservation, Washington, dealt with by the Act of March 22, 1906 (34 Stat. 80), are hereby restored to tribal ownership to be held in trust by the United States to the same extent as all other tribal lands on the existing reservation, subject to any existing valid rights." Section 2 of that Act, authorizing exchanges to effect land consolidation between Indians and non-Indians in Okawogen County, provides that the "acquisition of lands pursuant to this Act shall be limited to lands within the boundary of the reservation." This seems a clear recognition by Congress that lands opened under the Act of 1906 are still within the existing boundaries of the Colville Reservation.

Since it is the boundaries of the reservation, rather than the fee title to the property, which is controlling under 18 U.S.C. 1151, the land in issue seems to us to be in "Indian Country." Hence, under 18 U.S.C. 1153, the crime of burglary would be punishable by the United States, and not the state.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

SEPTEMBER 1960.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No. 71-1182

RAYMOND MATZ, PETITIONER

v.

G. RAYMOND ARNETT

On Writ of Certiorari *to the*
California Court of Appeal, First District

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The order of the Supreme Court of California denying petitioner's application for review (Pet. App. C) was entered on December 16, 1971. The opinion of the Court of Appeal, First District (Pet. App. A), is reported at 20 Cal. App. 3d 729, 97 Cal. Rptr. 894.

JURISDICTION

On December 16, 1971, the Supreme Court of California denied petitioner's application for review. A petition for a writ of certiorari was filed with this

Court on March 14, 1972, and was granted on January 15, 1973. This Court's jurisdiction rests on 28 U.S.C. 1257(3).

EXECUTIVE ORDER AND STATUTES INVOLVED

The Executive Order of October 16, 1891, I. Kappler, *Laws and Treaties* 815 (1904), reads as follows:

EXECUTIVE MANSION
OCTOBER 16, 1891

> It is hereby ordered that the limits of the Hoopa Valley Reservation in the state of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April 8, 1864, (13 Stats., 39), be and the same are hereby extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley reservation to the Pacific Ocean; *Provided, however,* That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended.
>
> BEN J. HARRISON.

The Act of June 17, 1892, 27 Stat. 52, reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That all of the lands embraced in what was Klamath River Reservation in the State of California, as set apart and reserved under authority of law by an Executive order dated November sixteenth, eighteen hundred and fifty-five, are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands: *Provided,* That any Indian now located upon said reservation may, at any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment of land for himself and, if the head of a family, for the members of his family, under the provisions of the act of February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and, if found entitled thereto, shall have the same allotted as provided in said act or any act amendatory thereof: *Provided,* That lands settled upon, improved, and now occupied by settlers in good faith by qualified persons under the land laws shall be exempt from such

allotment unless one or more of said Indians have resided upon said tract in good faith for four months prior to the passage of this act. And the Secretary of the Interior may reserve from settlement, entry, or purchase any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians. And any person entitled to the benefits of the homestead laws of the United States who has in good faith prior to the passage of this act, made actual settlement upon any lands within said reservation not allotted under the foregoing proviso and not reserved for the permanent use and occupation of any village or settlement of Indians, with the intent to enter the same under the homestead law shall have the preferred right, at the expiration of said period of one year to enter and acquire title to the land so settled upon, not exceeding one hundred and sixty acres, upon the payment therefor of one dollar and twenty-five cents an acre, and such settler shall have three months after public notice given that such lands are subject to entry within which to file in the proper land office his application therefor; and in case of conflicting claims between settlers the land shall be awarded to the settler first in order of time: *Provided*, That any portion of said land more valuable for its mineral deposits than for agricultural purposes, or for its timber, shall be entered only under the law authorizing the entry and

sale of timber or mineral lands: *And provided further,* That the heirs of any deceased settler shall succeed to the rights of such settler under this act: *Provided further,* That the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children.

Approved, June 17, 1892. [Bold type shows language added by Senate amendment of House bill.]

18 U.S.C. 1151 reads as follows:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. 1162 provides in relevant part:

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	*Indian country affected*
*	* *
California	All Indian country within the State.
*	* *

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; * * * or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping or fishing or the control, licensing, or regulation thereof.

The California Fish and Game Code, Section 12300, reads as follows:

> Irrespective of any other provisions of law, the provisions of this code are not applicable to California Indians whose names are inscribed upon the tribal rolls, while on the reservation of such tribe and under those circumstances in this State where the code was not applicable to them immediately prior to the effective date of Public Law 280, Chapter 505, First Session, 1953, 83d Congress of the United States.

QUESTION PRESENTED

Whether petitioner's fishing nets were seized by the State of California within Indian country as defined by 18 U.S.C. 1151 (62 Stat. 757, as amended by 63 Stat. 94).[1]

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's of October 10, 1972, inviting the Solicitor General to express the views of the United States in this case.

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[1] Having ruled that the land where the nets were seized was not Indian country, the California courts did not reach the issue whether, if the land is Indian country, petitioner is a beneficiary of rights which either are preserved from state regulation by 18 U.S.C. 1162(b), *supra*, or entitle him to the exemption of California Fish and Game Code, Section 12300, *supra*. See Pet. App. A, pp. 1-2.

STATEMENT

This action was brought by the respondent, director of the state Department of Fish and Game, for the forfeiture of five nylon gill nets owned by the petitioner on the ground that he used the nets in violation of California's fish and game laws. The nets were seized by a state game warden on September 24, 1969. The nets were stored in open containers upon land owned by a lumber company within 200 feet of the Klamath River on land that had once been part of the Klamath River Reservation and that had been made part of the Hoopa Valley Reservation by Executive Order in 1891 (Pet. App. A, p. 1; Pet. App. B, pp. 4-5).

The petitioner intervened to resist the forfeiture alleging that he is an enrolled Indian of the Yurok (Klamath River) Tribe, that the nets were seized within Indian country as defined by 18 U.S.C. 1151, and that the California law prohibiting use of the nets was therefore inapplicable.

The trial court held that the land where the nets were seized was not "Indian country" within the scope of 18 U.S.C. 1151 and was not within an Indian reservation within the meaning of California Fish and Game Code, Section 12300, because the Act of June 17, 1892, which had opened the Reservation for public purchase of excess land had, in effect, terminated the twenty miles of the reservation nearest to the Pacific Ocean (Pet. App. B, pp. 1-2). The state Court of Appeal affirmed the decision on the same

grounds (Pet. App. A), and the Supreme Court of California denied petitioner's application for review (Pet. App. C). Petitioner then filed a petition for a writ of certiorari in this Court, which granted the petition on January 15, 1973.

SUMMARY OF ARGUMENT

I. The events leading to the Act of June 17, 1892, show that the Act did not terminate the portion of the Hoopa Valley Reservation to which it applied. The seaward twenty miles of the addition to the Hoopa Valley Reservation had been the Klamath River Reservation. Because of legal problems in maintaining multiple separate reservations, the President, by Executive Order in 1891, had made the Klamath River Reservation part of the Hoopa Valley Reservation. The reference in the 1892 act to "what was the Klamath River Reservation" merely designates the portion of the addition to the Hoopa Valley Reservation that had previously been a separate reservation. It does not indicate a congressional abolition of half of the just created Hoopa addition.

The Act of 1892 can properly be understood only in light of the General Allotment Act which Congress had recently passed. In that Act Congress maintained Indian reservations but permitted allotments of land within reservations to individual Indians and sales of surplus land to non-Indians. The General Allotment Act, however, did not require the President to make allotments within any particular reservation.

Consequently a number of Acts requiring allotments and disposal of surplus land within particular reservations were passed. The 1892 Act was such an Act. Nothing in the Act purports to terminate the part of the reservation to which it applies. When Congress has wished to terminate all or part of a reservation it has done so explicitly.

II. The consistent course of administrative and congressional action subsequent to the Act of 1892 supports the proposition that that Act did not abolish the Klamath River portion of the Reservation. The Department of the Interior, shortly after the passage of the Act, was required to determine whether allotments made under the Act were allotments on or off a reservation. In a carefully reasoned and documented opinion the Department in charge of administering the Act ruled that the Act reconfirmed, rather than cast doubt upon, the continued existence of the Reservation. This has been the consistent view of the Department of the Interior, and has also been the premise on which Congress has subsequently acted.

III. The decisions of this Court has consistently held that Acts opening reservations or parts of reservations for allotment and disposal of surplus land for the benefit of the resident Indians do not thereby abolish the reservations. *Seymour* v. *Superintendent*, 368 U.S. 351, is, in our view, controlling here. The Act of 1906 in question in *Seymour*, 34 Stat. 80, was identical in effect to the Act in question here. This Court held that that statute, while requiring allotment and disposal of surplus land in the Colville

Reservation, did not thereby terminate the Reservation. Moreover, although one of the primary purposes of the extension of the Hoopa Valley Reservation was to secure the Indians' fishing rights in the Klamath River, nothing in the 1892 Act purported to terminate those rights. An intent to take such rights without compensation merely by implication should not be presumed.

ARGUMENT

I. THE EVENTS LEADING TO THE ACT OF JUNE 17, 1892, 27 STAT. 52, AND THE ACT ITSELF SHOW THAT THE ACT DID NOT TERMINATE THE ADDITION TO THE HOOPA VALLEY RESERVATION CREATED BY EXECUTIVE ORDER ONLY MONTHS BEFORE, ON OCTOBER 16, 1891

A. The History of the Establishment of the Reservation

The Yurok Indians historically have been fishing people who live on the lower Klamath River near the Pacific Ocean, the area in question here. See Kroeber, *Handbook of the Indians of California*, p. 1 (1925).[2] Their very name means "downstream" in the language of the adjacent Karok Tribe. Kroeber, *supra*, at p. 15.

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[2] There are excerpts from Kroeber at A 34-44

On November 16, 1855, as authorized by the Act of March 3, 1855 (10 Stat. 686, 699), President Pierce set apart as an Indian reservation a strip of territory extending along the Klamath River for a width of one mile on each side for a distance of twenty miles inland from the Pacific Ocean. The area is a deep gorge, consisting of craggy timberland rich in redwood and pine with little arable land except at the river bank. The area was chosen because the Indians had always lived there and had depended largely on fish from the Klamath River for their diet and trade.[3]

In his 1861 Annual Report (quoted in 33 I.D. at 216) the Commissioner of Indian Affairs described the Reservation as follows:

> This reservation is well located, and the improvements are suitable and of considerable value. There is an abundance of excellent timber for fencing and all other purposes, and at the mouth of the Klamath river there is a salmon fishery of great value to the Indians.

In 1861 the Klamath river flooded and destroyed many of the Indian villages. This led the Interior Department to attempt a temporary relocation of the Yurok and other Klamath River Indians to a reservation on the Smith River, but few left and most of

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[3] See 1858 Annual Report of the Commissioner of Indian Affairs, p. 286, quoted in *Crichton* v. *Shelton*, 33 Decisions of the Department of the Interior (I.D.) 205, 216. See also 33 I.D. at 205-206.

those soon returned.[4] The Smith River reservation was thereafter abolished.[5]

In 1864 the Hoopa Valley Reservation, a 12-mile square about 50 miles inland from the mouth of the Klamath River, was created by administrative order authorized by the Act of April 8, 1864 (13 Stat. 39) (later confirmed by Executive Order of June 23, 1876, I Kappler, *supra*, at p. 815). Its creation inadvertently cast doubt on the continued *legality* of the Klamath River reservation (not on its occupation or use by Indians). This was so because the Act of April 8, 1864, *supra*, which authorized the President to create new Indian reservations within California, limited the number of new and old reservations to four, and, arguably, the President had exceeded that number. Indeed, in 1889 the Circuit Court for the Northern District of California ruled that because of the President's failure to list the Klamath River Reservation as one of the four, it was no longer legally a reservation. *United States* v. *Forty-Eight Pounds of Rising Star Tea*, 38 Fed. 400.

It was in response to this decision that, in order to preserve the Klamath River Reservation, President Harrison issued the Executive Order of October 16, 1891 (p. 2, *supra*) extending the Hoopa Valley Reservation to the sea in a strip one-mile wide on each side of the Klamath River so as to include the former

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[4] See *Crichton*, *supra*, 3 I D. at 208.

[5] Act of July 27, 1868, 15 Stat 198, 221

Klamath River Reservation. In *Donnelly* v. *United States*, 228 U.S. 243, this Court upheld the validity of the 1891 Executive Order extending the Hoopa Reservation to the sea.[6]

B. The Act of June 17, 1892 and the General Allotment Act

In our view, the Act of June 17, 1892, can properly be understood only in light of two considerations: (1) what Congress had done five years earlier in the General Allotment Act (Act of February 8, 1887, 24 Stat. 388) and (2) the changes made in the 1892 Act during the legislative process in order to incorporate Allotment Act provisions in it.

1. By the 1880's and 1890's the Indians in the West had given up vast areas of land, but they still had substantial holdings in the form of reservations, created by treaty, executive order, or statute. During this period there was much pressure on Congress to remove land from these reservations and make it available for settlement and exploitation by non-Indians. But there was also considerable feeling that to do so would violate treaties and generally break faith with the Indians who had been induced to give

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[6] *Donnelly* concerned a crime committed within the "connecting strip" joining the former Hoopa and Klamath River Reservations. The Court consequently did not specifically consider the effect of the Act of 1892. However, it characterized it as "opening" that part of the reservation to "settlement, entry and purchase," 228 U.S. at 253, not as terminating or abolishing it.

up larger areas of land and to become peaceful in return for federal protection and the reservations created for them. The General Allotment Act of 1887 was to some extent a congressional compromise of these conflicting pressures and considerations.

The policy of the Act was to continue the reservation system and the trust status of Indian land at least for the time being, but to allot individual tracts to Indians (in trust) which they would be encouraged to farm. When all the land had been allotted and the trusts had expired, the reservation could be abolished.[7] In the meantime, since acreage limitations were put on the allottments, there would usually be surplus land within reservations which could be made available to non-Indians. It was hoped that the resulting juxtaposition of the two races would be edifying to the Indians and encourage them to adopt white ways.[8]

While the General Allotment Act thus permitted the President to make allotments of reservations lands and, with tribal consent, to sell surplus lands, it did not require him to do so. Congress, therefore, occasionally enacted special legislation to assure that a particular reservation would be opened for allotment and non-Indian settlement. The Act of June 17,

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[7] The original trust period was to be 25 years, but those periods have often been extended. See p. 21, *infra*

[8] See, generally, United States Department of the Interior, Federal Indian Law, pp. 115-117, 127-129, 776-777 (1958).

1892, at issue in this case, is an example of such legislation.[9]

Because of the General Allotment Act and these special Acts opening land within reservations to settlement, it is common today to have extensive non-Indian holdings within reservations. As we show in point III, *infra*, however, allotments to Indians and sales to non-Indians, whether under the General Allotment Act or special Acts, do not in themselves terminate the reservations or even make the lands therein held by non-Indians cease to be Indian country. *Seymour* v. *Superintendent*, 368 U.S. 351, 357-359; *Ellis* v. *Page*, 351 F.2d 250 (C.A. 10); *State* v. *Molash*, 199 N.W. 2d 591 (Sup. Ct. S.D.).

2. The pressures of non-Indians to obtain some of the land and especially the redwood forests within the Klamath River Reservation were particularly strong. In 1879, at the request of the Department of the Interior, military forces were used to evict trespassers. Thereafter, the Secretary decided in 1883 to make allotments to Indians living on the reservation, but he revoked the decision because of inadequate surveys and nothing further was done at that time to make allotments or authorize white settlement.[10] In

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[9] The policy of allotment and sale of surplus lands within reservations was repudiated in the Indian Reorganization Act of 1934, 48 Stat. 984 *et seq.*, as amended, 25 U.S.C. 461 *et seq.*

[10] See Annual Report of the Commissioner of Indian Affairs for 1885, quoted in part in *Crichton*, *supra*, 33 I.D. at 214.

October 1891, the President reaffirmed the existence of the reservation by his Executive Order incorporating it into an extension of the Hoopa Valley Reservation (see p. 2, *supra*).

House Bill, H.R. 38, 52d Cong., 1st Sess., which after amendment became the Act of 1892 at issue here, was reported out of committee on February 5, 1892[11] and was passed by the House on March 1, 1892,[12] only months after the President had reaffirmed the existence of the reservation. The apparent purpose of the House Bill[13] was to seek to open the reservation to non-Indian interests without raising too much opposition. Its language did not purport to terminate the Reservation (the Hoopa extension) just created by the President, and it did not purport to "diminish" the Reservation. Nor did it call for the removal of the Indians.

The bill first designates, as the area to which it applied, what was "Klamath River Reservation" – thus only the seaward portion of the just created extension of the Hoopa Valley Reservation. The bill opened the designated portion of the Reservation for settlement under the homestead, mineral and timber laws. However, it recognized that there were both

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[11] H Rept No. 161, 52d Cong., 1st Sess.

[12] 23 Cong Rec 1598-1599.

[13] At, pages 2-3, *supra*, we have set forth the 1892 Act with the House language in normal type and the language added by the Senate in bold type.

Indian villages and settlements within that part of the reservation and authorized the Secretary of the Interior to set those apart for permanent use by the Indians. The bill provided for confirmation of title for non-Indians who had settled on reservation land not constituting Indian villages or communities, and specified that the funds derived from the sale of the land "shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children." The House bill thus recognized a continuing Indian community and a continuing federal responsibility for Indians living in this portion of the reservation.

The Senate, however, was not satisfied that the House bill adequately protected Indian interests; it amended the bill and called for a conference with the House. 23 Cong. Rec. 3918-3919. As a result of the Senate amendment, the first two provisos of the Act were added (see p. 3, *supra*, bold type). In these provisos the area in question is referred to as a "reservation" and "any Indian now located upon said reservation" is permitted to "apply to the Secretary of the Interior for an allotment of land for himself and * * * for the members of his family, under the provisions of * * * [the General Allotment Act]." In other words, the Senate, dissatisfied with the House bill, which would have allowed non-Indian settlement without first providing for Indian allotments, brought the Act into line with the General Allotment Act, with the difference that Congress ordered the opening

rather than leaving it to the President with the consent of the Indians.[14]

Nothing in the Act, or even in the House bill, purports to abolish the Reservation. The reference in the Act to "what was the Klamath River Reservation" merely identifies the part of the extension of the Hoopa Valley Reservation to which the Act applied (see p. 15, *supra*). The court below erred in relying on this descriptive designation as indicating abolition of the Reservation. When Congress has wished to abolish an Indian reservation, it has used direct and unambiguous language to accomplish that purpose. For example, when Congress abolished the nearby Smith River Reservation it stated: [T]he Smith River reservation is hereby discontinued." 15 Stat. 221. And

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[14] Senator Dawes, the author of the General Allotment Act, sat on the Conference Committee See 32 Cong. Rec. 3919 Because the House bill was significantly amended in the Senate and in the Conference Committee before it was enacted, respondent errs in relying (Br. pp 5-7) on statements in the House Report accompanying that bill which do not reflect the amendments designed to protect the interests of Indians living on the Reservation. Those amendments are inconsistent with the statements in the House Report (and with isolated similar statements by individuals during the floor debates) that the Klamath River area was no longer being used as a reservation – a statement as to which the Department of the Interior later declared "the committee was apparently mistaken * * * " (*Crichton, supra*, 33 I.D at 214) Moreover, although the House Report is dated more than 5 months after the Executive Order establishing the extension of the Hoopa Valley Reservation (see p. 15, *supra*), it makes no mention of this highly significant Presidential action affecting the land and people in question

when several Oklahoma Reservations were abolished, the tribes agreed to "'cede, convey, transfer, relinquish, and surrender, foreover and absolutely, without any reservation' all their claim in and to the lands embraced within the designated reservation." *Ellis* v. *Page,* 351 F.2d 250, 252 (C.A. 10).

In another example, Congress specified:

> [T]he reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby abolished. 33 Stat. 218.

See also 68 State. 250 (providing for the abolition of the Menominee Reservation) : *State* v. *Molash,* 199 N.W. 2d, 591 (Sup. Ct. S.D.); *Leech Lake Band* v. *Herbst,* 334 F. Supp. 1001 (D. Minn.)

The contrast of these statutory provisions with the Act at issue here is highly significant – particularly in light of the 1892 Act's provisions recognizing that Indians individually and in villages and communities would continue to live in the area and would continue to be under federal protection (see p. 4, *supra*).[15]

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[15] In 1893, pursuant to the 1892 Act and the General Allotment Act, 161 allotments were granted to Indians residing on the Klamath River part of the Hoopa Extension, thus demonstrating a sizeable Indian community at the time the Act was passed. These allotments averaged 60 acres each, totaling 9,762 acres, 40% of the approximately 25,000 acres of the part of the reservation opened for settlement. Finding of Fact No 83, p. 57,

(Continued on following page)

And there is nothing in the Act suggesting any loss of fishing rights for the Indian residents of the area or diminution of federal jurisdiction over the area.

II. THE CONSISTENT COURSE OF ADMINISTRATIVE AND CONGRESSIONAL ACTION SUBSEQUENT TO THE ACT OF JUNE 17, 1892, SUPPORTS THE PROPOSITION THAT THE ACT DID NOT ABOLISH THE KLAMATH RIVER PORTION OF THE 1891 EXTENSION OF THE HOOPA VALLEY RESERVATION

Interpretation of a law by the government agency responsible to administer it is entitled to great weight. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434; *Udall* v. *Tallman,* 380 U.S. 1, 16. The consistent course of administrative interpretation by the Department of the Interior has been, and remains, that

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Report of Commissioner in *Jessie Short, et al* v. *United States,* C Cls No 102-63. At the trial of the present case evidence was submitted showing that petitioner's mother holds such an allotment and that his fishing was in the close vicinity of that allotment (A 28-31)

In *Jessie Short,* pending in the United States Court of Claims, the issue is whether the joining of the two reservations gave all Indians residing therein rights in the whole or whether each group has rights only within its original portion. Neither the United States nor the other parties to that suit contest the continued existence of the whole as an Indian reservation though the decision of the California court of appeal in this case is, of course, noted

the Klamath River Reservation was not abolished by the 1892 Act and still survives.

In 1904 the Department of the Interior was required to rule on whether an allotment made in the Klamath River Reservation portion of the Hoopa Extension under the Act of June 17, 1892, was an allotment within an Indian reservation or outside a reservation. *Crichton* v. *Shelton,* 33 I.D. 205. The question of the survival of the Reservation after the 1892 Act was squarely presented. In a carefully reasoned and fully documented opinion, the Department ruled that the challenged allotments were allotments on a reservation, and that the 1892 Act, in authorizing such allotments, reconfirmed, rather than cast doubt upon, the continued existence of the Reservation. 33 I.D. at 219-220. This contemporaneous interpretation of the 1892 Act was rendered, not by the Bureau of Indian Affairs, but by the Department of the Interior – the Department charged with administering the Act both as to Indians (through the Bureau of Indian Affairs), and as to non-Indian settlers (through the Land Office).

The opinion is significant not only for its holding, but also for the thorough factual and historical background it set forth at a time when the events were less remote. Of particular importance here is the opinion's carefully documented statement that (33 I.D. at 217):

> * * * the lands within the reservation are peculiarly adapted to the purposes for which

> it was set apart, reference being had to the location of said lands and the habits and necessities of the Indians [occupying them]. There is little question that the prevailing motive for setting apart the reservation was to secure to the Indians the fishing privileges of the Klamath River. * * *

Testimony at a congressional hearing held in 1932[16] confirms that the Department of the Interior still considered the seaward twenty miles of the Klamath River to be an Indian reservation. O. M. Boggess, Superintendent (for 12 years) of the Department's Hoopa Indian Agency, in a statement taken at Hoopa California, September 24, 1932, testified (A. 14):

> Mr. BOGGESS. This reservation is 12 miles square and then there is an extension 1 mile on each side for an aditional 50 miles down the Klamath River to the east [sic] coast.
>
> Senator FRAZIER. Is it all connected?
>
> Mr. BOGGESS. Yes; and it is all classed by the Indian Office as one reservation.
>
> Senator FRAZIER. What do they call this reservation?

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[16] 72d Congress, *Survey of Conditions of the Indians in the United States*, Part 29, California, U.S Printing Office 1934. See A. 12-16.

> Mr. BOGGESS. They call it the Hoopa, and the mile strips they call the Klamath.

The Department of the Interior today administers the entire 1891 extension to the Hoopa Valley Reservation as an Indian reservation. See note 15, *supra*.[17]

Moreover, after it authorized entry to surplus lands in the 1892 Act, Congress also continued to treat the Klamath River Reservation as an existing reservation. Indians had continued to live on this part of the Hoopa Extension (as they do today), but the trust period on their allotments had expired in 1919. Instead of considering its responsibilities terminated in this area, Congress in the Act of December 24, 1942, 56 Stat. 1081, 25 U.S.C. 348a, extended "The period of trust on lands allotted to Indians of the Klamath River Reservation * * * ," reimposing "the trust on certain lands allotted to Indians of the Klamath River Reservation, California." And in the Act of May 19, 1958, 72 Stat. 121, Congress restored to tribal ownership 159.57 acres of "vacant and undisposed-of-ceded lands * * * on the following named Indian reservations * * * : Klamath River, California * * * ." Compare *Seymour* v. *Superintendent*, 368 U.S. 351, 356.

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[17] See, also, map of Indian Land Areas published by the Department of the Interior in 1971, which we have lodged with the Clerk of this Court.

III. THIS COURT'S DECISIONS INDICATE THAT THE FOREGOING CONSIDERATIONS ESTABLISH THE CONTINUED EXISTENCE OF THE RESERVATION

1. The Act of June 17, 1892, is only one of many Acts which between 1887 and approximately 1913 opened Indian reservations for allotments to individual Indians and settlement of surplus lands by non-Indians.[18] These Acts are modifications of the General Allotment Act designed to apply to specific reservations. While they vary in detail, they rather uniformly provide for allotments to individual Indians within the reservation, make surplus land available to homesteaders, and provide that the proceeds from the disposition of the surplus lands will be used for the benefit of Indians on the reservation. The question whether such Acts make either land allotted to Indians or land patented to non-Indians no longer Indian country has been before the courts many times and has been addressed by Congress in defining Indian country in 18 U.S.C. 1151, pp. 4-5, *supra*. Both before and after the enactment of 18 U.S.C. 1151, this

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[18] See, *e.g.*, Act of March 2, 1889, 25 Stat. 888 (Sioux Reservations), *United States* v. *Nice*, 241 U.S. 591; Act of March 22, 1906, 34 Stat. 80 (Colville Reservation), *Seymour* v. *Superintendent*, 368 U.S. 351; Act of May 29, 1908, 35 Stat. 460 (Cheyenne River Reservation), *United States ex rel. Condon* v. *Erickson*, 344 F. Supp. 777 (D. S.D.); Act of June 1, 1910, 36 Stat. 455 (Fort Berthold, Reservation), *The City of New Town, North Dakota* v. *United States*, 454 F.2d 121 (C.A. 8); Act of February 14, 1913, 37 Stat. 675 (Standing Rock Reservation), *State* v. *Molash*, 199 N.W.2d 591 (Sup. Ct. S.D.).

Court has consistently held that neither allotment nor sale of land within a reservation terminates the reservation.

In *United States* v. *Celestine*, 215 U.S. 278, the Court had to decide whether various patents of land made within a reservation precluded federal jurisdiction over a murder that might have occurred on patented land. The Court held (*id.* at 284):

> That the offense was committed within the limits of the Tulalip Indian Reservation is distinctly charged in the indictment and not challenged in the plea in bar. Although the defendant had received a patent for the land within that reservation, and although the murdered woman was the owner of another tract within such limits, also patented, both tracts remained within the reservation until Congress excluded them therefrom.

The general principles stated by the Court was that "* * * when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *Id.* at 285. The Court held that the patenting of allotments on the reservation to individual Indians did not constitute such separation and did not terminate the reservation.

Several years later in *United States* v. *Nice*, 241 U.S. 591, the Court was called upon to interpret the Act of March 2, 1889, 25 Stat. 888, which, similarly to the Act at issue here, required allotments to be made

within various Sioux reservations in accordance with the General Allotment Act and which authorized the Secretary of the Interior, with the consent of the tribe, to sell surplus land after the allotments had been made. The Court held that this Act did not terminate the reservation, since both the General Allotment Act and the Act in question "disclosed that the tribal relation, while ultimately to be broken up, was not to be dissolved by the making or taking of allotments, and subsequent legislation shows repeated instances in which the tribal relations of Indians having allotments under the Act was recognized during the trust period as still continuing." 241 U.S. at 596-597. See also *Wilbur* v. *United States*, 281 U.S. 206.

This Court's more recent decision in *Seymour* v. *Superintendent*, 368 U.S. 351, is, in our view, controlling here. The 1906 Act in question in *Seymour*, 34 Stat. 80, was identical in effect to the Act in question here. That Act (1) provided for allotments to Indians under the provisions of the General Allotment Act (Sec. 2); (2) required that surplus land be made available for homesteading (Sec. 3); (3) required that surplus land not settled by homestead be sold at auction (*ibid.*); and (4) provided that the proceeds received from homesteading and sale be used for the benefit of the Indians remaining on the reservation (Sec. 6). In holding that the Act did not terminate the reservation there at issue, the Court emphasized the absence from the Act of language abolishing the reservation or "restoring that land to the public

domain" (368 U.S. at 355) and the Act's requirement that the proceeds of sales of the land be used for the benefit of the Indians (*id.* at 355-356). The Court also relied on the subsequent interpretation of the Act by the Department of the Interior (*id.* at 357) and the subsequent congressional restoration to the tribe of undisposed of lands within the reservation (*id.* at 356).[19] All of these factors, which were controlling in *Seymour*, are also present, and equally controlling, here.

2. We note also that no mention is made in the Act of June 17, 1892, of depriving the Indians of the Hoopa Valley Reservation Extension of either their ownership of the river bed or their fishing rights.[20]

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[19] The Court in *Seymour* also rejected the State's alternative contention that the reservation, if not totally abolished, had at least been diminished to the extent of actual purchases of lands within it by non-Indians. The Court held this contention inconsistent with the definition of Indian country in 18 U.S.C. 1151 as including "'all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent * * * .'" 368 U.S. at 357-358.

[20] After extensive hearings in 1964 the Senate let die in committee two proposals to terminate Indian fishing rights on the West Coast, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, on S. J. Res. 170 and S. J. Res. 171, 88th Cong., 2d Sess. And Congress in 18 U.S.C. 1162 (b) (p. 5, *supra*) in granting criminal and civil jurisdiction over Indian country to certain States specifically excepted federally protected fishing rights.

In *Donnelly* v. *United States*, 228 U.S. 243, 259, this Court held that the river bed was part of that Reservation and emphasized the importance of fishing to Indian life as follows:

> Does the reservation include the bed of the Klamath River? The descriptive words of the order are "a tract of country one mile in width on each side of the Klamath River and extending," etc. It seems to us clear that if the United States was the owner of the river bed,[21] a reasonable construction of *this language requires that the river be considered as included within the reservation.* Indeed, in view of all the circumstances, it would be absurd to treat the order as intended to include the uplands to the width of one mile on each side of the river, and at the same time exclude the river. *As a mater of history it plainly appears that the Klamath Indians established themselves along the river in order to gain a subsistence by fishing.* The reports of the local Indian agents and superintendents to the Commissioners of Indian Affairs abound in references to fishing as their principal subsistence, and the river is described as running in a narrow canyon through a broken country, the Indians as dwelling in small villages close to its banks. [Emphasis added.]

See also *Metlakatla Indians* v. *Egan*, 369 U.S. 45; *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620.

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[21] The Court held that it was. *Id.* at 264.

The obvious intent of specifically including the riverbed and shore in the Hoopa Extension (Executive Order of October 16, 1891) was to protect the right of the Indians to fish. Nothing in the Act of 1892 purported to terminate the Tribes' ownership of the riverbed or their fishing rights. An intent to take such rights without compensation merely by implication should not be presumed. *Menominee Tribe* v. *United States*, 391 U.S. 404. See also *Kennedy* v. *District Court of Montana*, 400 U.S. 423.

CONCLUSION

The judgment of the California Court of Appeal should be reversed and the case should be remanded for determination of the issues not reached by the courts below.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

KENT FRIZZELL,
Assistant Attorney General.

HARRY R. SACHSE,
Assistant to the Solicitor General.

CARL STRASS,
GLEN R. GOODSELL,
Attorneys.

MARCH 1973.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1148

IN THE MATTER OF THE APPLICATION OF
CHERYL SPIDER DECOTEAU, PETITIONER

v.

THE DISTRICT COURT FOR THE
TENTH JUDICIAL DISTRICT

On Writ of Certiorari to the
Supreme Court of South Dakota

No. 73-1500

DON R. ERICKSON, WARDEN, SOUTH DAKOTA
STATE PENITENTIARY, PETITIONER

v.

JOHN LEE FEATHER, ET AL.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether the Act of March 3, 1891, opening land within the Lake Traverse Indian Reservation to non-Indian settlement, granted the State of South Dakota criminal and domestic relations jurisdiction over members of the Sisseton, Wahpeton Sioux Tribe with respect to acts done on such land patented to non-Indians.[1]

TREATY AND STATUTE INVOLVED

The Treaty of February 19, 1867, 15 Stat. 505, is set forth in the Brief for Petitioner in *DeCoteau* at App. 1-6.

The pertinent provisions of the Act of March 3, 1891, 26 Stat. 989, are set forth in the Brief for Petitioner in *DeCoteau* at App. 7-15.

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[1] It is common ground that, since South Dakota is not a "Public Law 280 State" by original designation or subsequent election (see Act of August 15, 1953, 67 Stat. 588: 18 U.S.C. 1162; 28 U S C 1360), the State lacks civil and criminal jurisdiction over Indians within the boundaries of a subsisting reservation, regardless of whether the acts occurred on Indian trust lands or lands patented to non-Indians. See 18 U.S.C. 1151. Accordingly, the question presented might be more simply stated as: Whether the boundaries of the Lake Traverse Indian Reservation remain as originally established by the Treaty of 1867

STATEMENT

This brief supplements the memorandum submitted in response to the Court's order of April 29, 1974, inviting the Solicitor General to express the views of the United States in *DeCoteau* v. *The District County Court,* and expresses the views of the United States in the closely related case of *Erickson* v. *Feather, certiorari* was granted in both cases on June 3, 1974.

1. DeCoteau v. District County Court (No. 73-1148)

In December 1971, the State of South Dakota brought dependency and neglect proceedings in the District Court for the Tenth Judicial District of South Dakota against petitioner DeCoteau, an enrolled member of the Sisseton-Whapeton Sioux Tribe, seeking to terminate her parental authority over her minor children, Robert Lee Feather and Herbert John Spider, also enrolled members of the Tribe. The parties stipulated that all of the facts giving rise to the court's order occurred within the boundaries of the Lake Traverse Reservation, as established under the Treaty of February 19, 1867, *supra,* approximately half on allotted Indian land, and the other half on land patented to non-Indians (Decoteau, Pet. App. A. 2a; Pet. App. B, 9a). Both children were placed in foster homes by the county court.

On August 4, 1972, Mrs. DeCoteau moved in the county court for dismissal of the proceedings and

return of her children to her on the ground that all the incidents giving rise to the proceedings involved Indians and occurred on the Reservation and that the court therefore lacked jurisdiction. The county court denied the motion.

Mrs. DeCoteau then petitioned in the South Dakota Circuit Court for the Fifth Judicial Circuit for a writ of habeas corpus. That court denied the writ (DeCoteau, Pet. App. B). While it found that Mrs. DeCoteau and the two children are enrolled members of the Sisseton-Wahpeton Sioux Tribe (DeCoteau, Pet. App. B, 8a), it ruled that the county court had jurisdiction to entertain the dependency and neglect proceedings because some of the alleged incidents occurred on non-Indian owned land within the original boundaries of the Reservation, and, in the court's view, "the non-Indian patented land * * * is not within the Indian Country" (DeCoteau, Pet. App. B, 10a).

The Supreme Court of the State of South Dakota affirmed (DeCoteau, Pet. App. A). It held that the effect of the agreement between the United States and the Tribe dated December 12, 1889, and the Act of March 3, 1891, 26 Stat. 989, 1036, ratifying that agreement, was to separate from the Reservation all lands not allotted to Indians, and, because some of the incidents occurred on such land, the State courts had jurisdiction over the family relationships at issue.

2. Erickson v. Feather, et al. (No. 73-1500)

The ten respondents in this case are all enrolled members of the Sisseton-Wahpeton Indian Tribe. They were all tried and convicted in the courts of South Dakota for alleged crimes committed within the Treaty boundaries of the Lake Traverse Reservation, but not upon trust land. At the time this suit was instituted they were incarcerated in the South Dakota State Penitentiary (Erickson, Pet. App. A, 3a). They petitioned in the United States district court in South Dakota for writs of habeas corpus on the ground that the State of South Dakota did not have jurisdiction to try, convict, and sentence them because their alleged criminal acts took place within the boundaries of the Lake Traverse Reservation (Erickson, Pet. 2). The district court, on stipulation that "the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land * * * ," denied the writs (Erickson, Pet. App. B, 10a-19a).

The Court of Appeals for the Eighth Circuit reversed (Erickson, Pet. App. A, 7a-9a). After reviewing the decisions of this Court, and its prior decisions on the effect of opening reservations to non-Indian settlement, the court stated (*id.* at 6a):

> The case before us is not unlike *Seymour* [v. *Superintendent,* 368 U.S. 351] *Mattz* [v. *Arnett,* 412 U.S. 481] and *Condon* [*United States ex rel. Condon* v. *Erickson,* 478 F.2d 684 (C.A. 8)]. The overall climate of legislative activity concerning Indian reservations

> during the period from 1887 through 1910 received its primary impetus from the General Allotment Act. See *Cohen, supra* at 78-80, (§§ 11-13). The 1891 Act, by its express terms, refers to the General Allotment Act of 1887. Just as in the beforementioned three cases, the reservation here was not sold to the government outright but merely opened for settlement under the homestead laws and the 1887 general allotment plan. Allotment and homesteading do not suggest congressional purpose to terminate the reservation. *Seymour, supra.*

The Court found no evidence in the 1891 Act's legislative history of a congressional intent to do other than open the Reservation for non-Indian settlement (Erickson, Pet. App. A, 8a), and noted that the State Supreme Court had recently denied state jurisdiction in a similar situation in *State* v. *Molash,* 199 N.W. 2d 591. The court of appeals concluded that the boundaries of the Lake Traverse Reservation remain as established by treaty and the State of South Dakota had no jurisdiction to try the respondents (Erickson, Pet. App. A, 8a-9a).

3. The Reservation and the Tribe

The Sisseton and Wahpeton Sioux were a portion of the Sioux Nation who, in the Sioux outbreaks of 1862, did not rebel against the United States. Some "freely perilled their lives during that outbreak to rescue the residents of the Sioux reservation, and to obtain possession of white women and children made

captives by the hostile bands." Others fled, "fearing the indiscriminate vengeance of the whites" (Treaty of February 19, 1867; DeCoteau, Pet. Br. App. 1).

In 1867 the United States made a treaty with the Sisseton-Wahpeton Tribes in which the Tribes "cede[d] to the United States the right to construct wagon-roads, railroads * * * and other such public improvements * * * across the lands claimed by said bands (including their reservation as hereinafter designated) * * * " (*id.* at 2; Art. 2). In consideration for the cessions made and services rendered by the Tribes, the United States established for these Tribes "as a permanent reservation" a triangular tract of land that became known as the Lake Traverse Reservation (*id.* at 3; Art. 3).[2] The Treaty further – provided (*id.* at 6; Art. 10):

> The chiefs and head-men located upon either of the reservations[3] set apart for said bands are authorized to adopt such rules,

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[2] In connection with our brief *amicus curiae* in *Antoine* v *The State of Washington*, No. 73-717, this Term, we lodged with the Clerk copies of the U.S. Department of the Interior, Bureau of Indian Affairs Map, "Indian Lands and Related Facilities as of 1971 " That map shows the Lake Traverse Reservation at issue here. We are supplying copies of the map to counsel herein. We have also appended to this brief a diagram sowing the location of trust and tribal lands within the Reservation This diagram is taken from a more detailed but bulky map prepared by the Bureau of Indian Affairs which we are lodging with the Clerk.

[3] Article 4 of the Treaty also established the Devil's Lake Reservation in North Dakota

> regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands upon the respective reservations, and shall have authority, under the direction of the agent, and without expense to the Government, to organize a force sufficient to carry out all such rules, regulations, or laws, and all rules and regulations for the government of said Indians, as may be prescribed by the Interior Department: *Provided,* That all rules, regulations, or laws adopted or amended by the chiefs and headmen on either reservation shall receive the sanction of the agent.

On December 12, 1889 the Sisseton-Wahpeton Sioux entered into an agreement with the United States providing that, in accordance with the Act of February 8, 1887 (the General Allotment Act, 24 Stat. 388), the Tribes do (DeCoteau, Pet. Br. App. 8):

> * * * hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservaiton set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made.

The agreement also provides that, in addition to certain settlements of past claims and indemnities, the Indians shall receive $2.50 for each acre of land

conveyed, to be deposited in the Treasury and used "for the education and civilization of the said bands of Indians * * * as provided in section five of the General Allotment Act of 1887] * * * *") *id.* at 9).[4]

The ratifying Act of March 3, 1891, after reciting the Agreement in full, provides, among other things, that the land ceded by the Indians shall be –

> subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located * * * . [*id.* at 15.]

In accordance with the Act of 1891 a large amount of land within the Reservation was patented to non-Indians. A large amount also remains Indian trust land. The State Circuit Court in *DeCoteau* found as a fact (DeCoteau, Pet. App. B, 9a, finding IX):

> That lots or tracts of non-Indian patented or deeded land and lots or tracts of unpatented Indian trust land are interspersed in a crazy-quilt pattern over the entire area within the boundaries of the Lake Traverse

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[4] The Agreement provided that the money was to earn interest at 3% and be available for appropriation by Congress. The 1891 Act raised the interest rate to 5% and authorized the President, without further congressional action, to use any part of the funds for the "education and civilization" of the Tribe (*id.* at 14).

Indian Reservation as established by the treaty of February 19, 1867.

The Sisseton-Wahpeton Sioux Tribe has remeained a major Indian Tribe. Its present enrolled membership is 6,010, of whom 3,200 live on or near the Lake Traverse Reservation. The Tribe has a Constitution and by-laws approved by the Secretary of the Interior. In addition to having an active tribal government, it operates, with federal assistance, its own police force (presently 14 persons) and maintains a tribal court with two judges and various other personnel.[5]

It is the position of the United States, in accord with the decision of the Eighth Circuit in *Erickson*, that the Act of March 3, 1891, did not disestablish the Lake Traverse Indian Reservation and that the State of South Dakota is without jurisdiction over the domestic affairs or alleged criminal acts of Indians arising within the boundaries of the Reservation as established by the Treaty of February 19, 1867.

SUMMARY OF ARGUMENT

The essential question presented by these cases is whether the Act of March 3, 1891, by which unallotted land within the Lake Traverse Reservation was opened for settlement by non-Indians, removed

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[5] Information supplied by the Sisseton-Wahpeton Agency of the Bureau of Indian Affairs.

that land from the Reservation. In approaching the question it is important to bear in mind that an Indian reservation does not connote total Indian or federal ownership of the land within it. It refers to a geographical area within which the legislative authority of the Tribe functions and the area within which federal rather than state criminal jurisdiction applies in matters affecting Indians.

The 1891 Act did not specifically change the boundaries of the Reservation or return land to the public domain, and its repeated references to the General Allotment Act show that Congress intended no more than to "open" the Reservation for non-Indian settlement. This Court's decisions in *Seymour* v. *Superintendent*, 368 U.S. 351, and *Mattz* v. *Arnet*, 412 U.S. 481, show that this limited purpose is consistent only within preservation of the Reservation as a jurisdictional unit. The special provisions of the Act as to the 16th and 36th sections also show that Congress did not regard the opening of the Reservation as altering its boundaries.

Subsequent administrative and legislative actions confirm that the 1891 Act did not disestablish the boundaries of the Reservation. The President, in proclaiming the availability of lands for settlement after passage of the Act, described them as "land embraced in said reservation" and "lands within the Lake Traverse Reservation opened to settlement" (*infra*, p. 22). And the Department of the Interior has held the boundaries of the Reservation to be unaffected by the 1891 Act. Recently Congress has authorized

the Secretary of the Interior to purchase lands "within the boundaries of the Lake Traverse Reservation" for the use of the Tribe and has restored to the Tribe certain federal lands within the Reservation. These acts strongly affirm the continued existence of the Reservation as a unit of federal and Indian jurisdiction.

Moreover, given the scattering of trust lands throughout the Reservation, the State's position would be destructive of law and order on the Reservation. Since the State here (being a non-Public Law 280 State) can assert no jurisdiction over Indians on trust lands, federal and trival jurisdiction over Indians everywhere within the Reservation's treaty boundaries is required for effective law enforcement.

Similarly, the Tribes' civil jurisdiction over the Reservation Indians, a basic part of tribal self-government, should not depend on the title to the lot within the Reservation where a particular act takes place. There is no reason to believe that Congress intended so to impede the Tribe's right to govern its own people. Accordingly, the judgment of the Eighth Circuit in *Erickson* should be affirmed, and the judgment of the Supreme Court of South Dakota in *DeCoteau* should be reversed.

ARGUMENT

I

THE ACT OF MARCH 3, 1891, DID NOT ALTER THE BOUNDARIES OF THE RESERVATION AS ESTABLISHED IN THE TREATY OF FEBRUARY 19, 1867

Article 3 of the Treaty of February 19, 1867 (DeCoteau, Pet. Br. App. 3), granted the Sisseton and Wahpeton Sioux Indians a permanent Reservation with definite boundaries. Article 10 of that treaty (*id* at 6) granted the Tribes within the Reservation the right to make their own laws and be governed by them, subject to the supervision of the United States. The basic question in this case is whether the Act of March 3, 1891, which clearly permitted non-Indian settlement within the Reservation, also altered the boundaries of the Reservation. In considering that issue we must remember that an Indian reservation does not connote total Indian or federal ownership of the land within it. It refers to a geographical area within which the legislative authority of a tribe functions. *Worcester* v. *Georgia*, 6 Pet. 515; *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164. It also describes the area within which federal criminal jurisdiction in matters affecting Indian applies, 18 U.S.C. 1151, and the area within which services of the Bureau of Indian Affairs are primarily directed, *Morton* v. *Ruiz*, 415 U.S. 199. Accordingly, the fact that portions of the land within the Reservation are owned by non-Indians is immaterial. The controlling question is whether Congress deliberately terminated

or changed the boundaries of the Reservation by the Act of 1891.

1. The General Scheme of the 1891 Act Suggests No Change in the Reservation's Boundaries

The 1891 Act begins by ratifying and quoting in full the 1889 Agreement made between the Tribe and the United States. The Agreement, in its preamble, twice states that it is made under the authority of the Act of February 8, 1887, the General Allotment Act, and quotes from that Act the language which authorizes the President, after allotments have been made, to negotiate with Indian tribes for the sale of their unallotted lands (*DeCoteau,* Pet. App. C, 13a). The Agreement then specifically provides for the sale of the unallotted land of this Tribe "*within the limits of the reservation*" (*id.* at 14a; emphasis added), and directs that the payment shall be deposited in the Treasury to be appropriated by Congress for the "education and civilzation" of the Indians (*ibid.*). The Act of 1891 added to the agreement a further reference to the General Allotment Act (*id.* at 19a, sec. 29) and the proviso that the lands ceded shall:

> be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school

> purposes, and be subject to the laws of the State wherein located. [*Id.* at 20a.][6]

Several things are immediately apparent. The negotiation with the Indians, the allotments to them, and the cession made by them are expressly made under the authority of the General Allotment Act. The boundaries of the Reservation are not expressly altered and no separately described portion of the Reservation is vacated, returned to the public domain, or set aside for settlement. The government is not free to use the opened land for any purpose, but only for homesteading, townsites and school land. The tribal relationship is expressly continued and monies from the sale of the land are not distributed but are kept in trust to be appropriated by Congress or applied by order of the President for the "education

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[6] The background of the negotiation of the 1889 Agreement and the enactment of the 1891 Act are exhaustively set out in the brief of respondent. In our view, essentially two points are established: first, the non-Indian inhabitants of South Dakota intensely desired the opening of the Lake Traverse Reservation for settlement by non-Indians (see DeCoteau, Resp. Br., 16); second, the Tribe, which had endured four years of drought, was badly in need of money. See E Ex Doc. No 66, 51st Cong., 1st Sess., p. 19 Neither of these facts, however, in any way implies that the boundaries of the Reservation had to be or were reduced. Indeed, the only money immediately paid to the Tribe was not part of the consideration for the lands "ceded" but about $500,000 conceded to be due for scout services and a cancelled annuity For the future, the Indians expected to have expended on their behalf the interest on the amount nominally deposited in the Treasury in "payment" for the land, approximately $80,000 annually (when the interest rate was raised to 5%).

and civilization" of the "bands of Indians or members thereof" (*id.* at 19a). Thus, on the face of the statute, it does not appear that Congress intended to change the boundaries of the Lake Traverse Reservation.

2. The References to the General Allotment Act Show the Reservation Was Maintained

Both the 1889 Agreement and 1891 Act were adopted pursuant to the General Allotment Act of 1887. The philosophy of the latter Act was succinctly stated in *Mattz* v. *Arnett*, 412 U.S. 481, 496:

> [The General Allotment Act] permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing.

It was not the purpose of the General Allotment Act to divide reservations into a scattering of land under federal jurisdiction and a scattering under state jurisdiction. *Seymour* v. *Superintendent*, 368 U.S. 351, 357-358. Rather, as this Court stated in *Mattz, supra*, 412 U.S. at 497, quoting from *Seymour, supra*:

> "The Act did no more [in this respect] than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians,

> regarded as beneficial to the development of its wards."

Nor was it the intent of the General Allotment Act to disturb tribal relations prior to the time that the trust status of allotments should be abolished. In *United States* v. *Nice,* 241 U.S. 591, 596-597, the Court stated:

> [The General Allotment Act] disclosed that the tribal relation, while ultimately to be broken up, was not to be dissolved by the making or taking of allotments, and subsequent legislation shows repeated instances in which the tribal relation of Indians having allotments under the act was recognized during the trust period as still continuing.

In sum, while the General Allotment Act of 1887 provided for some settlement of non-Indians within reservations, the congressional intent was to continue the reservation system and to maintain established relations with the Tribes and federal trust responsibility over the reservations until these protections were no longer necessary. The 1889 Agreement and 1891 Act were adopted in conformity with this policy and should not be held to have tacitly abolished or diminished the Reservation here in question.

3. The Absence of Language in the 1891 Act Expressly Altering the Boundaries of the Reservation or Returning Land to the Public Domain Shows That the Reservation Boundaries Were Not Altered

In *Mattz* v. *Arnett, supra,* this Court stated (412 U.S. at 504-505; footnote omitted):

> Congress [in 1892] was fully aware of the means by which termination could be effected. * * * The Court stated in *United States* v. *Celestine,* 215 U.S., at 285, that "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." A congressional determination to terminate must be expressed on the fact of the Act or be clear from the surrounding circumstances and legislative history. See *Seymour* v. *Superintendent,* 368 U.S. 351 (1962); *United States* v. *Nice,* 241 U.S. 591 (1916).

In a footnote, the Court gave the following examples of termination language [*Mattz, supra,* 412 U.S. at 504, n. 22]:

1. 15 Stat. 221 (1868) ("the Smith River reservation is hereby discontinued").

2. 27 Stat. 63 (1892) (* * * the North Half of the Coleville Indian Reservation] "the same being a portion of the Colville Indian Reservation * * * be, and is hereby vacated and restored to the public domain").

3. 33 Stat. 218 (1904) ("the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same hereby abolished").

There is no such language in the 1891 Act at issue here. The Reservation is not discontinued. A discrete portion of it is not "vacated and restored to the public domain." The reservation lines are not abolished.

Moreover, to read into the language opening unallotted lands for settlement an intent to remove them from the Reservation would inevitably create a reservation with crazy quilt boundaries, a result that both Congress (see 18 U.S.C. 1151) and this Court have reasonably sought to avoid.

4. The Use of the Word "Cede" and the Payment Arrangement of the Act Did Not Change the Reservation Boundaries

a. The State argues that the provisions "ceding" the unallotted portion of the Reservation to the United States tacitly removes that land from the Reservation.

There are several reasons why this is not so. First the "cession" is not an outright return of the land to the public domain but a transfer expressly for the limited purpose of opening the land for homesteading in accordance with the General Allotment Act. Thus, though the Indians in the "cession" expressed their willingness that the government dispose of unallotted land, the government remained

under a trust responsibility to dispose of it in a certain way, assumed to be in the Indians' interest as well as that of the government.

That a "cession" of unallotted land within a reservation does not of itself disestablish the reservation is supported by this Court's decision in *Ash Sheep Co.* v. *United States,* 252 U.S. 159. The question was whether the defendant had grazed its sheep on public land, which was entirely legal, or on "land belonging to any Indian or Indian tribe" in violation of R.S. 2117. The lands involved were (252 U.S. at 164):

> within the part of the Reservation as to which the Indians, in terms "ceded, granted, and relinquished" to the United States all of their "right, title and interest."

Nevertheless, the Court held that the lands remained in Indian ownership until actually sold to homesteaders because the lands were ceded to the United States only for subsequent sale (except for the 16th and 36th sections) and on conditions set forth in the Act. While, in our case, jurisdiction rather than ownership is at issue, *Ash Sheep Co.* at least indicates that the use of the word "cede" does not always imply a termination of the Indian-federal relationship as to the land "ceded".

b. The State, however, argues (see DeCoteau, Resp. Br. 59-65) that because the Tribe was paid a "sum-certain" for the unallotted land, with the government recouping its money as the lands were sold,

rather than being paid as the lands were sold to homesteaders, the conveyance to the government should be held to have removed the lands from the Reservation. We see no reason so to conclude.

The payment, realistically, was no more immediately available to the Tribe than if it had been paid only as each tract was sold. The monies stipulated as payment for the lands ceded were to be deposited in the United States Treasury, and the expectation was that only the interest on this trust fund would be expended, and then only as found necessary for the benefit of the Tribe by the President or Congress. As Congressman Call explained:

> * * * The amount is reimbursed, so that it is but a nominal appropriation. The entire amount come back into the Treasury. It is nothing but a loan of the public credit of the United States to the accomplishment of these purposes [of the General Allotment Act] and in no respect touches the taxation upon the people of this country.
>
> Mr. President, there has been a great deal of objection found to this bill which has no just foundation. All the legislation to the bill is but the application of the existing law on the subject. [22 Cong. Rec. 3881, reprinted in DeCoteau, Resp. Br. 65].

Consequently, payment in this manner is not a reliable indication of an intent by Congress to change the boundaries of a reservation. Where the references to allotment and opening under the

General Allotment Act are as specific as they are here and where, as here, there is no language even arguably disestablishing a discrete part of the Reservation, the payment scheme does not indicate disestablishment anymore than would a scheme of payment as individual lots are sold to homesteaders. In either situation, the conveyance of the unallotted lands is handled by the government for the benefit of the Tribe in accordance with the General Allotment Act without thereby terminating the Reservation. Compare *Seymour* v. *Superintendent, supra*, 368 U.S. at 354-359.

5. The Provision of the 1891 Act Referring to the "Laws of the State Wherein Located" Did Not Disestablish All or Part of the Reservation

The Act of 1891 provides that the land ceded shall "be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located * * * " (Decoteau, Pet. Br. App. 15). The Supreme Court of South Dakota, in *DeCoteau*, interpreted the final phase of this passage as expressly subjecting activities on all lands sold to state civil and criminal jurisdiction (DeCoteau, Pet. App. A, 5a-7a). The Eighth Circuit in *Erickson* found the language ambiguous – both as to its general meaning and as to whether it applied only to the

school sections (which the court considered more plausible) or to all land sold. It concluded that "[W]e do not read this clause as a clear indication of congressional intention to terminate the Lake Traverse Reservation" (Erickson, Pet. App. A, 6a-7a). In our view, the "laws of the state" language is simply not addressed to the question of whose law shall govern acts committed on the land in question; the purpose is, rather, to make clear that, while the unallotted land shall be open only to settlement under the federal homestead and townsite laws, an exception is made for the 16th and 36th sections which are to be used only for common school purposes and may be used or sold as permitted by state law for that purpose.

The language was necessary because the South Dakota Enabling Act did not reserve the 16th and 36th section, in Indian reservations for school purposes, and special language was needed to accomplish that purpose. See the Statement of Senator Gamble at 35 Cong. Rec. 3187 and the Statement of Congressman Burke at 38 Cong. Rec. 1423, both reproduced at DeCoteau, Resp. Br. 136-138. Indeed, if the "ceded" land had been regarded by Congress as no longer forming part of the Reservation, no such special language would have been needed to establish the 16th and 36th sections as school land.[7]

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[7] See Section 1 of the Act of March 2, 1895, 28 Stat. 899-900, 43 U.S.C. 856, which, 4 years later, provided general

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In sum, while the Act of March 3, 1891 paved the way for homesteading by non-Indians within the Lake Traverse Reservation, it did not change the boundaries of the Reservation or abolish it. Thus questions of criminal and civil jurisdiction within this Reservation are determined as within any other Reservation.

II

SUBSEQUENT ADMINISTRATIVE AND LEGISLATIVE ACTIONS CONFIRM THAT THE 1891 ACT DID NOT DISESTABLISH THE 1867 TREATY BOUNDARIES

a. The most important administrative interpretation of the 1891 Act is the contemporaneous proclamation of President Harrison opening the Reservation for settlement (Procl. of April 11, 1892, 27 Stat. 1017, DeCoteau, Pet. Br. App. 16-20). In that Proclamation, made after enactment of the 1891 Act and after payment to the Tribes for the land "ceded," the President consistently referred to the Reservation in the present tense and the lands opened for settlement as "lands embraced in said reservation" (DeCoteau, Pet. Br. App. 18). The Proclamation further referred the reader to "the accompanying schedule, entitled "Schedule of lands *within the Lake*

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authorization for state, selection of school lands "within the boundaries of any Indian reservation in such state" from "surplus lands * * * purchased by the United States "

Traverse Reservation opened to settlement by proclamation of the President * * * " (*id.* at 19; emphasis added). This proclamation is important not only because it is a contemporaneous construction of the effect of the 1891 Act, but also because it was the basis on which non-Indian settlers purchased land, giving them fair warning that they were purchasing land within an Indian reservation.

Subsequent executive orders extending the trust period on allotments on April 16, 1914, and April 19, 1924, (Nos. 1916 and 3994, respectively) each refer to the 'Sisseton and Wahpeton Bands of Sioux Indians of the Lake Traverse Reservation, North and South Dakota." And in decisions and literature of the Department of the Interior after 1891 there are numerous references to land "in" or "within" the Lake Traverse Reservation. *Circular, Sisseton and Wahpeton Lands,* 14 L.D. 302; *Madella O. Wilson,* 17 L.D. 153; *Edward Parant,* 20 L.D. 53. Nothing could be clearer than the report of the Sisseton-Wahpeton Indian Agent in 1900 describing the Reservation:

> The reservation is in the northeastern part of South Dakota, occupying parts of Roberts, Day, Grant, Marshall and Codington counties and extending into Richland and Sargent counties of North Dakota. It is about 120 miles long and at the State line 42 miles wide, coming to a point near Watertown, S. Dak. * * *

> There are 1,970 [allotted] pieces of land situated from one end of the reservation to the other * * * .
>
> [Annual Report, Commissioner of Indian Affairs, United States Indian Affairs Office, 385 (1900)].

See also the reference to the Annual Reports of the Commissioner of Indian Affairs in DeCoteau, Pet. Br. 42, n. 30.

Of equal importance, the exercise of trust responsibility by the United States for this Tribe, and the Tribal relationship of its members, remained intact. A decision of the Eighth Circuit in 1901, ten years after allotment and disposal of surplus land, makes this continuing relationship clear. *Farrell* v. *United States*, 110 Fed. 942. The case concerned the application of the laws against sale of liquor to Indians to a sale to one La Framboise, a person of mixed Sioux and Caucasian ancestry. While the boundaries of the Reservation were not at issue, La Framboise's membership in the Sisseton-Wahpeton Tribe was. The court noted that:

> La Framboise had received his allotment and patent, and the lands within the reservation of the Sisseton and Wahpeton bands of Sioux Indians, to which he belonged, that had not been allotted, had been opened to settlement * * * . [*Id.* at 947.]

Nevertheless, it was found that there was continuing regulation by the Tribe of its membership and family

relations and constant supervision over the Tribe by the resident federal agent:

> [The issuing of allotments] did not radically change the title to the lands reserved for [these Indians], or their need of care and education. The government held the title to their reservation in trust for them collectively before, it held the title to their allotments in trust for them individually after, the issue of the patents. There was every reason why congress should retain and exercise its power to superintend the trade with them, and none to induce it to renounce it. By the treaty of 1867 the United States agreed to appoint and maintain an agent for these Indians at Lake Traverse, and by its legislation and the rules of the interior department it made it the duty of this agent to use every endeavor to suppress the traffic in intoxicating liquors with them, to educate them, and to induce them to cultivate the soil. There has been no express abrogation of this agreement in any subsequent treaty or act of congress, and the government has continued to comply with it since the allotments as it did before. Agreements are not released or abrogated and statutes are not repealed by implication unless the subsequent agreements or laws are necessarily repugnant to those which preceded them. [*Id.* at 951.]

This evidence of the continued exercise of federal trust responsibility after the opening of the Reservation supports our conclusion that the Reservation was

opened, but not dissolved. See also *United States* v. *Rickert,* 188 U.S. 432.

We have been unable to discover contemporaneous opinions of the Department of the Interior directed precisely to the jurisdictional effect of the 1891 Act. There are, however, two recent decisions, predating either of the appellate decisions under review, and rendered at a time when *DeMarrias* v. *State,* 319 F. 2d 845 (C.A. 8), overruled by the *Erickson* decision, was still intact. Both decisions, made by the Field Solicitor of the Department of the Interior in Aberdeen, South Dakota (the office which deals with this Tribe on a regular basis), sustained the continued federal and tribal authority and the commenusurate lack of state jurisdiction over Indians within the Treaty boundaries of the Lake Traverse Reservation (Opinions of June 9, 1972 and August 16, 1972, DeCoteau, Pet. Br. App. 21-33). Interpretation of a law by the government agency responsible to administer it is, of course, entitled to great weight. *Udall* v. *Tallman,* 380 U.S. 1, 16. This is particularly true when the statute may affect the status of an Indian reservation and the trust responsibilities of the United States. *Seymour* v. *Superintendent, supra,* 368 U.S. at 357; *Mattz* v. *Arnett, supra,* 412 U.S. at 505.[8]

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[8] South Dakota points out (DeCoteau, Rep. Br. 113-116) that the depiction of the Reservation on government maps varied considerably over the years since 1891. From 1892 to 1908 the Reservation was not shown on the maps. From 1909 to 1917 the Reservation was shown as an "open" reservation, but

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b. Congress, since the opening of the Reservation, has continued to appropriate funds for the Sisseton-Wahpeton Reservation or Agency[9] and has

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the 1918 map shows it was a "former" reservation Modern maps show the Reservation simply as a "reservation " We think these differences are unimportant. The early map-makers wanted to show that the lands were no longer reserved for exclusive Indian occupancy, but were open for settlement. As this Court and Congress began to refine the jurisdictional meaning of such openings the map makers followed suit Indeed the meaning of the word "reservation" itself has changed over the years. In early years it seemed to have been used to mean literally land reserved for exclusive Indian use. Later, as a result of the various "opening" Acts, it came to have the broader jurisdictional meaning that it has today The first decision of this Court to clarify the meanings of "reservation" and "Indian country" after the General Allotment Act was *United States* v *Celestine*, 215 U S. 278, 285-286. This process of clarification continued with enactment of 18 U.S C. 1151 and this Court's subsequent decision in *Seymour* v *Superintendent, supra*. Thus, as with early maps, early casual references to the Reservation as the "former reservation" (see DeCoteau, Br. 9) are of little significance; they indicate only that the Reservation had been opened for non-Indian settlement, which is not disputed. South Dakota also points out a reference to the "former Sisseton Indian Reservation" in *United States* v. *Rickert, supra*, 188 U S at 432 (see DeCoteau, Resp Br. 173). That phrase, however, is not the Court's but part of a question from the pleadings below as recited in the question certified to the Court. Reservation bundaries were not at issue and the use of the phrase must be considered in light of its limited meaning at the time.

[9] See, for typical early appropriation language, 39 Stat. 988 and 42 Stat. 576 In recent years general appropriations have not been by particular reservation or agency. An extensive accounting of trust funds of the Tribe expended by the United States is available in General Services Administration Report,

(Continued on following page)

never referred to the Reservation as a "former reservation" as it did with the reservations recognized by this Court as continuing to exist in *Seymour* v. *Superintendent, supra,* 368 U.S. at 356, n. 12, and *Mattz* v. *Arnett, supra,* 412 U.S. at 496, n. 17. This consistent appropriation process is a significant exercise of trust responsibility. Recently, moreover, Congress has unmistakenly reaffirmed its view that the opening of the surplus lands to non-Indian settlement did not terminate or diminish the Reservation (Public Law 93-489 and Public Law 93-491, signed by the President October 26, 1974). Indeed, in Public Law 93-489 Congress restored to "the United States in trust for the Sisseton-Wahpeton Sioux Tribe" certain federally owned land "of the Lake Traverse Indian Reservation in North and South Dakota." Since the land had not been trust land, this is a clear indication of the congressional understanding that the Reservation was never abolished and always included non-trust land. Similarly, Public Law 93-491 authorizes the Secretary of the Interior to acquire lands:

> *within the boundaries of the Lake Traverse Reservation* * * * for the purpose of consolidating landholdings, eliminating fractional heirship interests in Indian trust lands, providing land for any tribal program for the improvement of the economy of the tribe and its members through the development of

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The Lower Sioux Indian Community in Minnesota, et al., Docket No 363 (June 1967) before the Indian Claims Commission.

> industry, recreational facilities, housing projects, and the general rehabilitation and enhancement of the total resource potential *of the reservation.* [Emphasis added.]

It further authorizes the Tribe to sell tribal property and, from the proceeds, purchase "*other land on the reservation.*" Again, we have a recognition of the Reservation's existence beyond trust lands and its continued service as the home and political jurisdiction of the Sisseton-Wahpeton Tribe. While these recent Acts are not determinative of an earlier congressional intent, they are consistent only with the continuity of the Reservation's original boundaries and should be given weight. See *Seymour* v. *Superintendent, supra,* 368 U.S. at 356.

III

THE TRIBE'S INHERENT RIGHT OF SELF-GOVERMENT, CONFIRMED IN THE TREATY OF FEBRUARY 19, 1867, AND THE PRACTICALITIES OF PERFORMING THE CONTINUING TRUST RESPONSIBILITIES OF THE UNITED STATES TOWARD THE TRIBE SUPPORT THE INTERPRETATION OF THE ACT OF 1891 AS NOT DIMINISHING THE RESERVATION

We have discussed the jurisdiction of the State within the borders of the Lake Traverse Reservation primarily in terms of the precise wording of the statute opening the Reservation for non-Indian settlement. But the alleged ambiguity of the Act of

1891 and of similar Acts opening reservations also calls for a broader approach.

We note, first, that the Sisseton-Wahpeton Tribe remains an important and populous Indian tribe exercising its federally guaranteed powers of self-government under federal guardianship. A large amount of land, scattered about within the boundaries of the Reservation, remains trust land. The State of South Dakota did not choose to assume responsibility for civil and criminal law and law enforcement within Indian country in the state when it could have done so under Public Law 280, *supra*. Compare *Williams* v. *Lee*, 358 U.S. 217, 222-223; *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 177-178. Nor is the decision that the State asks of this Court one that could give the State jurisdiction over acts occurring on trust land. Instead, the result sought by the state would greatly increase the difficulty of achieving adequate law and order on the reservation by requiring plat-book jurisdiction – state jurisdiction over Indians on this lot, federal or tribal jurisdiction on the next. Obviously, such an absurd result, in a reservation such as this, where a large Indian population lives, ought to be avoided, if possible.

Also, and equally important, it is, and has been, the policy of the United States that, unless specifically terminated by Congress, Indian tribes are self-governing political communities. In *McClanahan* v. *Arizona State Tax Commission*, *supra*, 411 U.S. at 168, this Court stated:

> * * * "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789 (1945). This policy was first articulated by this Court 141 years ago when Mr. Chief Justice Marshall held that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive * * * ."

See also *Williams* v. *Lee*, *supra*, 358 U.S. at 220:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right or reservation Indians to make their own laws and be ruled by them.

This right to self-government was explicitly guaranteed the Sisseton-Wahpeton Tribe in its 1867 Treaty with the United States and has never been taken away by Congress. Article 10 of that Treaty states (DeCouteau, Pet. Br. App. 6):

> The chiefs and head-men located upon either of the reservations set apart for said brands are authorized to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands upon the respective reservations, and shall have authority, under the direction of the agent, and without expense to the Government, to organize a force sufficient to carry out all such rules,

> regulations, or laws, and all rules and regulations for the government of said Indians * * *.

Tribal control over domestic relations, at issue in *DeCoteau,* is at the heart of this right of Tribal self-government. See, *e.g., United States* v. *Quiver,* 241 U.S. 602, 603-604. The question of a child's welfare cannot be decided without reference to his family structure. This involves both a sympathetic knowledge of the individuals involved, and a knowledge of the background culture. No matter how well-intentioned, state authorities are not likely to have insight into these important areas. Moreover, if such authorities are to have jurisdiction over tribal children in dependency and neglect cases, there is a substantial chance that such children may be placed in non-Indian homes outside the Reservation and be deprived of their cultural identity.[10] The Sisseton-Wahpeton Tribe opposed such practices in a tribal resolution on July 6, 1972, which states:

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[10] This concern, in the light of present experience, was strongly expressed by the North American Indian Women's Association in a recent report. North American Indian Women's Association, Inc., *Project Report for Development of a Prototype Program for Indian Children with Special Needs,* BIA Contract No. K51C14200761, December 15, 1973. The first recommendation made by the study was that "[W]hen at all possible, Indian Children should be placed with Indian foster parents." *Id.* at 62.

SISSETON-WAHPETON SIOUX

WHEREAS, The Sisseton-Wahpeton Sioux Tribe is interested in the well-being of all the enrolled members of the tribe and

WHEREAS, Minor children of Sisseton-Wahpeton descent have been placed in non-Indian foster and adoptive homes all over the United States,

WHEREAS, The Tribal council is in the process of researching the sovereign status of the tribal entity in respect to its jurisdiction as stated in the constitution of the Sisseton-Wahpeton Sioux Tribe, and,

WHEREAS, It is the intent of the Sisseton-Wahpeton Sioux Tribe to establish its own method of social and economic development and well-being of the enrolled members, and,

WHEREAS, It is the strong feeling of the tribal council "to make every stand possible to keep these children on the reservation" (minutes of June 6th council meeting) and "the tribal council would like these children to be placed in an Indian licensed home until an Indian home can be found for them to be adopted."

THEREFORE, BE IT RESOLVED, that Mr. Bert Hirsch, legal counsel from the Association of American Indian Affairs, will stand on these grounds in his argument in Robert County Court on July 7, 1972 and future cases of this nature.

The Sisseton-Wahpeton Tribe is a responsible body, concerned about its young people. It should have authority over dependency and neglect and similar procedings concerning its own people anywhere within the Reservation.[11] If this authority were fragmented so as to apply only to acts committed on trust land within the Reservation, it would be practically meaningless as an exercise of effective self-government. And neither the Tribe, in domestic relations matters and with respect to the criminal offenses left to its control, nor the United States, in its control over major crime, should have to search the tract books in order to determine whether it or the State has jurisdiction. *Seymour* v. *Superintendent, supra,* 368 U.S. at 358.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of South Dakota should be reversed and the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

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[11] The Tribe has assumed such authority under its tribal code

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WALLACE H. JOHNSON,
Assistant Attorney General.

LOUIS F. CLAIBORNE,
HARRY R. SACHSE,
Assistants to the Solicitor General.

EDMUND B. CLARK,
EDWARD J. SHAWAKER,
Attorneys.

NOVEMBER 1974.

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1976

No. 75-562

ROSEBUD SIOUX TRIBE, PETITIONER

v.

HONORABLE RICHARD KNEIP, ET AL.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-61) is reported at 521 F.2d 87. The opinion of the district court (Pet. App. 63-113) is reported at 375 F.Supp. 1065.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1975 (Pet. App. 61). A petition for a writ of certiorari was filed on October 11, 1975, and was

granted on May 24, 1976. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether three Acts of Congress, which authorized the sale of land within portions of the Rosebud Indian Reservation to non-Indians and directed that the proceeds of each sale as received should be deposited in trust for the benefit of the Tribe, diminished the exterior boundaries of the Reservation as they existed in 1889.

STATUTES INVOLVED

The Acts of April 23, 1904, 33 Stat. 254; March 2, 1907, 34 Stat. 1230; and May 30, 1910, 36 Stat. 448, are set forth in Appendix C to the petition.

STATEMENT

In June 1972, the Rosebud Sioux Tribe of Indians filed suit in the United States District Court for the District of South Dakota, seeking a declaratory judgment that the exterior boundaries of the Rosebud Reservation, as defined in the Act of March 2, 1889, 25 Stat. 888, had not been altered by three Acts of Congress (Act of April 23, 1904, 33 Stat. 254; Act of March 8, 1907, 34 Stat. 1230; Act of May 30, 1910, 36 Stat. 448) opening certain unallotted surplus land to non-Indian settlement.

In the Act of March 2, 1889, Congress "restored to the public domain" (25 Stat. 896) one-half of the Great Sioux Reservation established in 1868, but preserved for the Sioux Tribes six Reservations in present-day North and South Dakota (*id.* at 888-890). Among these was the Rosebud Reservation, located in the south central portion of South Dakota, and composed of the Counties of Todd, Tripp and Mellette, and parts of Gregory and Lyman counties.[1]

In 1901, the Rosebud Tribe agreed (Pet. App. 15, n. 21) to "cede * * * and convey to the United States" for a specified sum of $1,040,000 the unallotted land within the Gregory County portion of its Reservation for non-Indian settlement. Congress rejected this agreement in 1902 and 1903. The problem "was, simply put, money" (Pet. App. 16). Congress then "amended and modified" the agreement (Pet. App. 117) and enacted it as the Act of April 23, 1904 (Pet. App. 117-120). The primary amendments were that (1) the Indians were not guaranteed any consideration for the land except with respect to the 16th and 36th sections (school section), but were to be paid only as the lands were actually sold to settlers;[2] (2) the United States did not guarantee to find purchasers

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[1] A map of the Reservation, showing the 1889 boundaries and the boundaries as found by the court of appeals, is reproduced at Pet. App 113.

[2] Section 2 of the Act (Pet. App. 119) set forth a schedule of the prices per acre for the land, which varied according to the time at which the land was sold.

but agreed only to "act as trustee for said Indians to dispose of said lands" (Section 6, Pet. App. 120); and (3) limitations were placed on the distribution of the proceeds to the Indians (compare Art. III, Pet. 118, with Art. III, Pet. App. 115-116).

The Rosebud Reservation was further opened by the 1907 Act, which, as passed, provided (Pet. App. 121) "that the Secretary of the Interior * * * is hereby, authorized and directed, * * * to sell or dispose of all that portion of the Rosebud Indian Reservation * * * [within Tripp County] except such portions thereof as have been, or may hereafter be, allotted to Indians" (and except school sections that were to be paid for by the United States, and granted to the State).[3] The 1907 Act further provided (Section 5, Pet. App. 122-123) that the funds received should be deposited in an interest-bearing account in the Treasury of the United States "to the credit of the Indians belonging and having tribal rights on the Rosebud Reservation," that the interest shall be paid annually to the Indians, that all funds up to one million dollars should be distributed after ten years on a per capita basis to the Indians, and that the balance should be expended or distributed for the Indians' benefit at the discretion of

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[3] Each Act contains substantially identical school land provisions to the effect that Sections 16 and 36 of the lands in each township are not to be disposed of, but are reserved for donation to the State for use as common schools. These lands were to be paid for by the federal government See Pet App. 120, 121, 123, 127.

the Secretary of the Interior. The 1907 Act concluded, as did the 1904 Act (Section 6, Pet. App. 120), with a section declaring (Section 8, Pet. App. 123):

> * * * nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the *United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided* * * * [Emphasis added.]

The 1910 Act (Pet. App. 124-127), like the 1907 Act (Pet. App. 121), began with an authorization to the Secretary to "sell and dispose" of surplus lands within a described portion (Mellette County) of the Reservation App. 124).[4] The Act further provided (*ibid.*)

> [t]hat any Indians to whom allotments have been made on the tract to be *ceded* may, in case they elect to do so before said lands are offered for sale, relinquish same and select

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[4] The 1907 Act uses the phrases "sell *or* dispose" (emphasis added).

> allotments in lieu thereof on the diminished reservation * * *. [Emphasis added.]

The 1910 Act further required (Section 4, Pet. App. 125) that a commission be established, composed of "[o]ne resident citizen of the State of South Dakota, one representative of the Interior Department, and one person holding tribal relations with said tribe of Indians," to determine the price setters would be charged for the land. The proceeds of any eventual sales were to be deposited in the Treasury to the credit of the "Indians belonging and having tribal rights on the said reservation," which "shall be at all times subject to appropriation by Congress for their education, support and civilization" (Section 7, Pet. App. 126). The 1910 Act (Section 11, Pet. App. 127), like the earlier Acts (Section 6, Pet. App. 120; Section 8, *id.* at 123), explictly stated that the United States was not obligated to purchase the surplus land, except Sections 16 and 36 for school purposes, and would act only as trustee for the Indians in disposing of the surplus land.

In a lengthy opinion the district court held that each of the 1904, 1907 and 1910 Acts extinguished the portion of the Reservation to which it applied (Pet. App. 63-113; see *id.* at 113). The court found no language in the Acts expressly terminating the Reservation in the counties involved and no "express discussion of state versus federal jurisdiction over the lands in question" (*id.* at 85); however, the court held that, in light of the "surrounding legislative history and the circumstances" (*id.* at 109) from 1901 to 1910,

Congress intended to extinguish the portions of the Reservation at issue.

The United States Court of Appeals for the Eighth Circuit affirmed (Pet. App. 1-61), after this Court had decided *DeCoteau* v. *District County Court*, 420 U.S. 425. The court rejected arguments of the Tribe, and the United States as *amicus curiae*, that the language of the Acts interpreted in light of prior decisions of this Court did not abolish the disputed portions of the Reservation, and that neither the legislative nor the administrative history established that the State had undisputed jurisdiction to the exclusion of the Tribe and the United States. The court thought that prior decisions, including this Court's decisions in *Seymour* v. *Superintendent*, 368 U.S. 351, and *Mattz* v. *Arnett*, 412 U.S. 481, and its own decisions in *City of New Town, North Dakota* v. *United States*, 454 F. 2d 121, and *United States ex rel. Condon* v. *Erickson*, 478 F. 2d 684, were "of limited utility" in deciding this case (Pet. App. 5) and concluded that "the overriding judicial inquiry remains unchanged, namely, the congressional intent" (*ibid.*). Stating that this Court's decision in *DeCoteau, supra*, permitted it to utilize "all materials reasonably pertinent to the legislation * * * as well as those bearing upon the historical context of its passage, such as the social forces then at work in the area * * *" (Pet. App. 8), the court found a "continuity" of circumstances from 1901 to 1910 that demonstrated Congress' intention to extinguish Indian jurisdiction

over the areas in question (*id.* at 26-28, 34, 38, 39-40, 44, 46, 48).

SUMMARY OF ARGUMENT

It is the position of the United States that the Acts of 1904, 1907, and 1910, while opening portions of the Rosebud Reservation to non-Indian settlers, did not contract the exterior boundaries of the Reservation. This position is based upon our assessment of the Acts themselves, the contemporary social and legislative history, subsequent treatment of the lands by the Department of the Interior, and doctrines developed by this Court in similar cases. While the courts below gave some attention to each of these factors, we believe that the courts overemphasized inconclusive legislative history. A more balanced analysis, we submit, requires a finding that Congress did not intend by these Acts to terminate most of the Reservation but expected that termination would occur, if at all, when the trust period on allotments expired.

This Court's decisions require compelling evidence to prove that reservation boundaries have been cut back without the consent of the affected Indian tribe and without guaranteed payment for the opened lands. Any different construction would place Indians in the position of surrendering jurisdiction over substantial portions of their reservation before any benefits had been assured or received. Thus, the Court found in *Seymour* v. *Superintendent,* 368 U.S.

351, and *Mattz* v. *Arnett,* 412 U.S. 481, that unilateral Acts of Congress, providing that the United States would not purchase Indian lands but would merely act as trustee for their sale, did not commit the opened lands to state jurisdiction. The Acts opening the Rosebud Reservation were drafted in similar fashion and are to the same effect.

The Acts of 1904, 1907, and 1910, do not demonstrate an intention to return lands to the public domain, and the clear language of other Acts expressly restoring lands to the public domain is notably absent. In contrast to public lands, which are subject to disposition under general laws, the lands of the Rosebud Reservation were to be sold only in accordance with the terms of the trust established by Congress; all proceeeds were explictly dedicated to the benefit of the Tribe. In fact, Congress included a provision granting school lands to the State in each Act, despite this Court's holding in 1902 that such provisions were unnecessary when lands were restored to the public domain. *Minnesota* v. *Hitchcock,* 185 U.S. 373.

Subsequent administrative actions confirm that the Acts did not disestablish the 1889 boundaries of the Reservation. Under the Indian Reorganization Act of 1934, 48 Stat. 984, as amended, 25 U.S.C. 461, *et seq.,* the Department of the Interior restored to Indian ownership lands in the opened portion of the Reservation, an action that could not have included lands "upon the public domain outside the geographic boundaries of any Indian reservation * * *" (48 Stat.

986). Moreover, numerous communications and reports show that the Deparement, before and after the Indian Reorganization Act, recognized territory in the opened counties as within the Rosebud Reservation. Recent appropriations are consistent with that viewpoint.

The uncertain legislative history does not demonstrate a contrary intention. Despite the emphasis placed on the legislative history by the court of appeals, the reports and debates show that Congress at no time concerned itself with the question of jurisdiction over the opened lands. While the court of appeals stressed references made in unrelated contexts, we submit that the inferences to be drawn from such references are at best ambiguous. They do not merit the weight that they received in the court of appeals.

The Acts of 1904, 1907, and 1910, therefore, do not demonstrate congressional intent to impede the Tribe's right to govern its own people.

ARGUMENT

I. THE DECISIONS OF THIS COURT HOLD THAT ACTS OF CONGRESS ESTABLISHING TRUSTS FOR THE SALE OF INDIAN LANDS DO NOT REDUCE RESERVATION BOUNDARIES

This Court, in deciding Indian cases, does not write upon a fresh slate. The Court has long recognized that "[t]he relation of the Indian tribes living

within the borders of the United States * * * [is] an anomalous one and of a complex character." *United States* v. *Kagama,* 18 U.S. 375, 381. "Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States." *Id.* at 383-384 (emphasis in original). With respect to legislation, therefore, "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter v. Shaw,* 280 U.S. 363, 367.

During the past fifteen years this Court has been asked three times to decide whether Congress intended to cut back reservation boundaries or to open up reservation lands for settlement with the existing boundaries unchanged. *Seymour* v. *Superintendent,* 368 U.S. 351; *Mattz* v. *Arnett,* 412 U.S. 481; *DeCoteau* v. *District County Court,* 420 U.S. 425. The principles developed by those decisions are directly applicable to the questions raised in this case.

In *Seymour,* this Court considered the effect of the Act of March 22, 1906, 34 Stat. 80, on the Colville Indian Reservation in the State of Washington. In 1892, the United States expressly vacated and restored a portion of the Reservation "to the public domain," 27 Stat. 62, 63. In the 1906, Act, however, no such language was included; the Secretary was merely directed "to sell or dispose" of unallotted lands within the Reservation (34 Stat. 80) and to place the proceeds as received from settlers into the Treasury for the benefit of the Indians (34 Stat. 81). The Act

further provided that the United States would act as a trustee in disposing of these lands for the Indians' benefit and not as a purchaser (34 Stat. 82). Because *Seymour* involved a criminal matter, this Court assessed the meaning of the 1906 Act against the backdrop of the definition of "Indian Country" found in 18 U.S.C. 1151.[5]

This Court concluded that "the purpose of the 1906 Act was neither to destroy the existence of the diminished Colville Indian Reservation nor to lessen federal responsibility for and jurisdiction over the Indians having tribal rights on that reservation." 368 U.S. at 356. The Colville Act "did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards" (*ibid.*). The Court noted that any other conclusion would result in checkerboard jurisdiction over Indians, a consequence that Congress sought to avoid by enacting 18 U.S.C. 1151 (*id.* at 358).[6]

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[5] Indian country is defined, in part, as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation * * *."

[6] This Court took particular note of the subsequent treatment of this area by Congress and by the Interior Department and gave particular attention to the Department's decision, 54 I.D. 559, that land within the Colville Reservation previously opened to settlement could be restored to Reservation status

(Continued on following page)

In *Mattz* this Court was required to decide whether the Klamath River Indian Reservation in California was terminated by an 1892 Act of Congress or remained Indian country as defined in 18 U.S.C. 1151 (412 U.S. at 483). After assessing legislative history and subsequent administration of the land by the Interior Department, the Court concluded, as it had in *Seymour,* that the mere opening of the Reservation to settlers did not mean that the Reservation was discontinued. Recognizing that "the House was generally hostile to continued reservation status of the land," the Court nonetheless found that Congress never terminated it (*id.* at 499)[7] but merely provided for sale of the surplus lands with the "proceeds of sales to be held in trust for the 'maintenance and education' * * * of the Indians" (*id.* at 504). Because a decision to terminate a reservation "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history"

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under the Indian Reorganization Act of 1934 (368 U S. at 357, n 14). This Court recognized a period of "congressional confusion" when the area was referred to as the "former Colville Reservation" (*id* at 356, n. 12), but did not find such references indicative of a Congressional intent to terminate jurisdiction over the Reservation.

[7] The State urged that a reference in the 1892 Act to "what was [the] Klamath River Reservation," indicated a Congressional intention to terminate. This Court found the reference to the Reservation "in the past tense * * * merely * * * a natural, convenient and shorthand way of identifying the land subject to allotment * * *" (*id.* at 498). Cf. *Seymour, supra,* 368 U.S at 356, n. 12

(*id.* at 505), this arrangement did not deprive the Indians of their important reservation rights.[8]

Placing the 1892 Act into the historic context of the General Allotment Act of 1887, 24 Stat. 388, the Court further observed that the Allotment Act "permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to *continue the reservation system* and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. *When all the lands had been allotted and the trust expired, the reservation could be abolished*" (412 U.S. at 496; emphasis added). See also *United States* v. *Nice*, 241 U.S. 591, 599. However, enactment of the Indian Reorganization Act in 1934, 48 Stat. 984, as amended, 25 U.S.C. 461 *et seq.*, ended the policy of allotment, and all trust periods were indefinitely extended (412 U.S. at 496, n. 18). Later, as the Court noted, portions of the land in the Klamath Reservation previously opened to

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[8] After this Court's decision in *Seymour*, the Eighth Circuit considered whether the Act of May 29, 1908, 35 Stat. 460, opening the Cheyenne River Reservation in South Dakota, diminished its boundaries. Relying on *Seymour*, it held it did not, *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (C.A. 8), and this Court in *Mattz* twice noted that decision with approval, remarking that it presented "issues not unlike those before us" (412 U.S. at 497, n. 19 and 505, n. 23). The Eighth Circuit had reached a similar conclusion in *City of New Town, North Dakota* v. *United States*, 454 F.2d 121, involving the effect of the Act of June 1, 1910, 36 Stat. 455, opening the Fort Berthold Reservation.

settlement were withdrawn and restored to tribal ownership (*id.* at 496, n. 17 and 505).[9]

In *DeCoteau*, the Court determined the effect of the Act of March 3, 1891, 26 Stat. 989, 1035, on the Lake Traverse Reservation. The 1891 Act had ratified an agreement in which the Tribe expressly ceded to the United States all its "right, title and interest" in the land for a lump sum. The Court contrasted this transaction with the Acts involved in *Seymour* and *Mattz* (420 U.S. at 447-449, stating that it "adhere[d] without qualification to both the holdings and the reasoning of those decisions"; the Court, however, found that "gross differences between the facts * * *" (*id.* at 447) justified a finding that the Reservation had been terminated.

The differences identified by the Court are important to the present case. The 1891 Act was a negotiated agreement with the Tribe, whereas the Acts involved in *Seymour* and *Mattz* were "unilateral" Acts of Congress not agreed to be the Tribes (*id.* at 448). The 1891 Act was a straightforward cession for a sum certain in amount, and not the arrangement found in *Mattz* and *Seymour* where proceeds from uncertain future sales were placed in trust for the benefit of the Tribe (*id.* at 448-449). The Department of the Interior did not, as it had in *Mattz* and

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[9] The Klamath River Reservation was also identified by the Interior Department (54 I.D. 559), as containing land, opened by the 1892 Act, which could be restored to reservation status.

Seymour, consistently regard the Reservation as continuing (*id.* at 448). These distinctions led to the conclusion that the Lake Traverse Reservation was extinguished and the land restored to the public domain.

The fact that the Indians' land holdings would be diminished as the land was sold, therefore, does not mean that the Rosebud Reservation itself was abolished in the areas where the land subject to sale was located. In *DeCoteau* (but not in *Seymour* or *Mattz*) the United States itself purchased the land in the Reservation pursuant to an agreement with the Indians; this, the Court held, restored the land to the public domain and extinguished the Reservation. 420 U.S. at 446-447. But under the Rosebud Acts, the federal government did not buy the Indians' land. The government acted merely as a trustee for the Tribe in selling its land to non-Indians; the land passed from the Indians to private individuals. It was not first made part of the public domain, and Congress appropriated no funds to pay for these lands, except for school sections. Rather, any funds distributed to or deposited on behalf of the Indians were to be derived from amounts paid by the non-Indian purchasers. If there were no buyers interested in the land the government was to sell for the Indians, the Indians would have received no money; yet according to the reasoning of the court below, the Tribe nevertheless would have been deprived of three-fourths of its Reservation. Such an intention should not be

attributed to Congress without the clearest kind of evidence.

Every court faced with similar questions, except the courts below, has found that such Acts of Congress did not extinguish portions of the Reservations but instead opened the Reservations to allow integration of Indians and settlers and to provide needed lands for the western migration.[10] This construction is consistent not only with proper concern for Indian sovereignty but also with the long-standing reluctance to place Indian wards within the reach of state jurisdiction. "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789.

Although the court of appeals found these principles "of limited utility" (Pet. App. 5), we believe they may not be so lightly dismissed.[11] While we do not

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[10] *Russ* v. *Wilkens*, 410 F. Supp. 579 (N.D. Cal.); *Leech Lake Band of Chippewa Indians* v. *Herbst*, 334 F. Supp. 1001 (D. Minn.); *City of New Town, North Dakota* v. *United States*, 454 F.2d 121 (C.A. 8); *United States ex rel. Condon* v. Erickson, 478 F.2d 684 (C.A. 8); *Putnam* v. *United States*, 248 F.2d 292 (C.A. 8); *Confederated Salish and Kootenai Tribes* v. *Namen*, 380 F. Supp. 452 (D. Mont.), affirmed, 534 F.2d 1376 (C.A. 9), pending on petition for certiorari, No. 76-185.

[11] The court of appeals apparently misunderstood (Pet. App. 24-25) the significance of the fact that Congress did not secure the approval of the Rosebud Indians as required by the Treaty of 1868 (15 Stat. 635, 639). While Congress had the power to dispose of lands without such consent, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, its decision to do so must be regarded as unilateral. In fact, the government's negotiator, Inspector James

(Continued on following page)

read the cases to say that Congress could never remove lands from a reservation by a unilateral decision to act as trustee for their sale, that construction should be greatly disfavored. This is particularly true when, as here, Congress demonstrated quite clearly that it did not intend to place the Indian lands within the public domain.

II. THE ACTS OF 1904, 1907 AND 1910 DID NOT RESTORE INDIAN LANDS TO THE PUBLIC DOMAIN

The United States does not dispute that Congress during the early 1900's expected that Indian reservations at some point would be abolished. Congress was faced with pressures to open additional land located within existing Indian reservations and Congress itself desired that Indians gradually develop a less tribal way of life. The integration of Indians while white settlers was viewed as an important step in that development. The question in this case, therefore, is not whether Congress intended the Rosebud Reservation to continue unchanged indefinitely but whether termination was to occur immediately upon passage of the Acts or at some later time, when the trust period on allotted Indian lands had expired.

McGlaughlin, repeatedly stressed to the Indian that their lands could be sold without their consent and that they should redirect their efforts to securing a reasonable price. *E.g.*, A. 476, 481, 490, 776, 803-804

1. The language of the Acts themselves does not disclose an intent to return land to the public domain. The 1904 Act provides for the Indians to "cede, surrender, grant and convey to the United States all their claim, right, title and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted [within Gregory County]" (Pet. App. 115), but that terminology was simply carried over from the unratified agreement for sale at a sum certain. The 1904 Act nowhere provides that the Reservation was abolished or that the lands were to be restored to the public domain. The Acts of 1907 and 1910 provide that the Secretary of the Interior shall "sell or dispose" (in the 1907 Act) or "sell and dispose" (in the 1910 Act) "of all that portion of the Rosebud Indian Reservation subsequently described (Pet. App. 121, 124). Again no mention is made that the Reservation is *pro tanto* terminated or that the lands were to become public lands. This reticence is in marked contrast to the express language used by Congress in other statutes. See 15 Stat. 221 (1868) ("the Smith River reservation is hereby discontinued"); 27 Stat. 63 (1892) ("the same being a portion of the Colville Indian Reservation * * * be, and is hereby vacated and restored to the public domain"); 33 Stat. 218 (1904) ("the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and

the same are hereby abolished"). See also *Mattz* v. *Arnett, supra,* 412 U.S. at 504, n. 22.[12]

The mere fact that the government had power to sell the Indians' lands does not mean that they are public lands. "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Newhall* v. *Sanger,* 92 U.S. 761, 763. The United States commonly owns public lands free of beneficial rights and may dispose of them for its own benefit. Its power over the Rosebud Reservation lands, however, was significantly different; under the Acts of 1904, 1907, and 1910, the United States could sell the lands only under specified conditions and was required to administer the proceeds for the benefit of the Rosebud Indians. Unlike agreements providing for sale for a sum-certain, the three Acts in question specifically stated that the United States did not guarantee to buy, or even to find purchasers for, the affected lands. In fact, part of the lands was later released from the

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[12] The language of the 1904 Act is similar to the statutory language discussed in *DeCoteau, supra,* and found sufficient to terminate the Reservation But Congress had *ratified* a sale for a sum-certain in that case, and the words of cession in that context merely reflected the common understanding of the Indians and the government The words in this case were originally part of a similar agreement, which Congress refused to ratify. Although Congress retained the form of the agreement in passing the 1904 Act, the language disappeared in the Act of 1907 and 1910, both of which were passed without tribal consent

trust in accordance with the Indian Reorganization Act of 1934 (pp. 28-33, *infra;* App. A, *infra,* p. 1A).

The provision for schol lands in each of the three Acts indicates that Congress was aware of the nature of this trust. In May 1902, this Court, in *Minnesota* v. *Hitchcock,* 185 U.S. 373, had considered the troublesome question whether a cession-in-trust to the government for resale gave Minnesota the right to Sections 16 and 36 of the ceded lands for school purposes.[13] (The Enabling Act admitting Minnesota to the Union, like the Enabling Act of South Dakota, provided that the State was entitled to Sections 16 and 36 from all "public lands" within the State for schools.) This Court concluded that, while Minnesota would be entitled to Sections 16 and 36 of public lands even though no express exception in the instrument of conveyance was made (185 U.S. at 392-393), the land in question had never been restored to the public domain because the cession was in trust and the proceeds from uncertain future sales were to be deposited in the Treasury for the Indians' benefit

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[13] Congress was well aware of the importance of *Minnesota* v *Hitchcock.* After the Department of the Interior moved to dismiss the State's original action in this Court, on the ground that the Chippewa Indians were indispensable parties, Congress passed an Act expressly permitting the Interior Department to appear instead of the tribe in such cases. Act of March 2, 1901, 31 Stat 950 The Committee Report on the bill (H R. 14191) stated that "it is of the utmost consequence * * * that there be the most speedy determination of a vexed question that has dragged through forty years" (H.R. Rep No. 2948, 56th Cong., 2d Sess. 1 (1901))

(185 U.S. at 395). Thus Congress, if it wanted the State to receive Sections 16 and 36 while they remained within the opened Indian reservation, had to include an express provision to that effect. Such provisions were contained in all three Rosebud Acts.[14]

The legislative history of these provisions, though sparse, is instructive. In 1902, bills were introduced to ratify the Agreement negotiated with the Tribe in the previous year. The bill reported to the Senate, in addition to supporting approval of the Agreement, proposed an additional provision not originally negotiated: the inclusion of a requirement reserving Sections 16 and 36 in each township in Gregory County "for the use of the common schools" and granting those sections to the State of South Dakota. S. Rep. No. 662, 57th Cong., 1st Sess. 1-2 (1902). The bill was passed in the Senate, but the House Committee on Indian Affairs rejected not only the provisions permitting free-homesteads but also the school lands provision, stating (H.R. Rep. No. 2099, 57th Cong., 1st Sess. 1 (1902)).

> The opinion of the committee is that this section is *not necessary,* as under *existing law*

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[14] A school lands provision was also contained in the Act of March 3, 1891, 26 Stat. 989, 1035, extinguishing the Lake Traverse Reservation. At that time, of course, this Court had not held that a State would be entitled to school sections out of public lands by the force, of its Enabling Act alone, and Congress therefore included an express grant even in Acts providing for purchase of lands for a sum certain

> sections 16 and 36 would be granted to the State upon the extinguishment of the Indian title. [Emphasis added.]

The bill never reached the House floor for a vote (Pet. App. 16, n. 23).[15] When the Agreement for a sum certain was abandoned, however, subsequent bills included an express grant for school lands.

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[15] The 1901 Agreement was an outright cession of Gregory County for a sum certain, which the Tribe conceded below would have extinguished the reservation status of the land and restored it to the public domain (Pet App. 16). See *DeCoteau* v *District Court, supra,* 420 U.S at 447-449. The House Indian Affairs Committee understood that, under such circumstances, it was *not* necessary expressly to reserve Sections 16 and 36 for school purposes because the South Dakota Enabling Act of 1989 provided that those sections would automatically revert to the State when Indian title was extinguished See 25 Stat. 676, 679, Section 10. The Senate Committee Report, supporting inclusion of the provision, was issued in March 1902, *before* this Court's decision in *Minnesota* v. *Hitchcock, supra.* The House Report was issued on May 17, 1902, after the *Hitchcock* decision Congress "must be deemed to have known" that the exact issue it was dealing with was resolved by this Court in *Hitchcock. Federal Power Commission* v. *Tuscarora Indian Nation,* 362 U.S. 99, 113. It was the House Report that accurately reflected existing law

The court of appeals mistakenly relied (Pet App. 29) on statements made by Senator Gamble in 1902 in favor of a school lands provision without noting that others regarded the provision as unnecessary The court then juxtaposed those statements with statements made in 1904 (Pet App. 30) after the sum certain method of payment had been discarded. The latter statements in fact simply emphasize the need to include school lands provisions when the uncertain-sum-in-trust method of payment is used.

The question arose again in connection with the Act of 1910. Although the school lands provision was included in that Act without substantial debate, a similar provision in a bill to open lands in the Fort Berthold Reservation, North Dakota, was more fully discussed, The Fort Berthold bill, described as "practically in the same form" as the 1910 Rosebud Act (45 Cong. Rec. 5794 (1910)), provided for sales according to the uncertain-sum-in-trust method, except for Sections 16 and 36 which were to be purchased by the United States. After discussion of the school lands provision, Senator Jones of Washington stated (45 Cong. Rec. 6741 (1910)):

> I think I am thoroughly familiar with the terms of these various bills, and I am satisfied that these lands are *not restored to the public domain at all.* Their disposition is provided for in a special way. *The title of the Indians is recognized, and the lands are sold for the Indians.* They are to have the benefit.
>
> I am not going to object to the bill, and I am not going of object to the provisions in it, but I did want to put in the RECORD my judgment that we are under *no obligation to purchase section 16 and 36, because we are not restoring these surplus lands to the public domain.* [Emphasis added.]

Senator Jones clearly recognized that the 1910 Fort Berthold Act, which was "practically in the same form" as the 1910 Rosebud Act, did not restore any lands to the public domain, and that Congress chose

voluntarily to include a grant of school lands to provide schools in the opened territory[16] The Eighth Circuit has held that the 1910 Fort Berthold Act did not diminish the exterior boundary of that Reservation. *City of New Town, North Dakota* v. *United States,* 454 F. 2d 121. It is highly unlikely that Congress would have intended a different result in substantially identical legislation passed within the same month.

2. There is also no reason to believe that these lands, not restored to the public domain by Acts of Congress, were nevertheless restored by issuance of the Presidential proclamations opening the lands for settlement. At that point, the trust was still in full effect and the Indians had yet to receive any benefits under the particular Acts. Lands unsold or forfeited were to be restored to the Indians (presumably through the trust) and would not have been available for sale under the general laws. Thus they bear little resemblance to public lands.

This conclusion is fortified by *Ash Sheep Co.* v. *United States,* 252 U.S. 159. In 1899, the United States had negotiated an agreement with the Crow Tribe, by which the Tribe agreed to "cede, grant and relinquish" to the United States, for a lump sum, a portion of its reservation in Montana, 33 Stat.

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[16] Since the opened areas where to be populated largely by white settlers, this action seems consistent with the purpose of the school lands provisions in the States' Enabling Acts

352-356. In 1904, however, the Congress unilaterally "amended and modified" the unratified 1899 Agreement to include an uncertain-sum-in-trust provision, 33 Stat. 361 (Section 6), and a trusteeship provision, 33 Stat. 361 (Section 8), while retaining the "cede, grant, and relinquish" language of the 1899 Agreement. The land was opened by Presidential Proclamation in 1906, 34 Stat. (Part III) 3200, and "[m]uch thereof ha[d] been disposed of * * *" *United States* v. *Ash Sheep Co.*, unpublished opinion, Brief of the United States as Amicus Curiae in Support of Petition for Hearing and Rehearing en Banc, p. 66 (filed in the court of appeals).

In 1913, the Ash Sheep Company sought to graze sheep on unallotted lands opened for settlement without compliance with Interior Department regulations, claiming that the Act of 1904 had diminished the Reservation and converted the land affected into "public land." This Court disagreed, stating (252 U.S. at 165-166):

> It is obvious that the relation thus established by the act between the Government and the tribe of Indians was essentially that of trustee and beneficiary and that the agreement contained many features appropriate to a trust agreement to sell lands and devote the proceeds to the interests of the *cestui que trust. Minnesota v. Hitchcock*, 185 U.S. 373, 394, 398. * * *
>
> Taking all of the provisions of the agreement together we cannot doubt that

> while the Indians by the agreement released their possessory right to the Government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee, *and that they did not become "Public lands"* in the sense of being subject to sale, or other disposition, under the general land laws. *Union Pacific R.R. Co.* v. *Harris*, 215 U.S. 386, 388. They were subject to sale by the Government, to be sure, but in the manner and for the purposes provided for in the special agreement with the Indians, which was embodied in the Act of April 27, 1904, 33 Stat. 352. * * *. [Emphasis added.]

Thus, the Presidential Proclamation of 1906 clearly had not converted the Indian lands into public lands outside the Reservation.

Furthermore, a bill (S. 4632) to give settlers additional time to make payments on lands within various North and South Dakota Reservations (including the Rosebud) was introduced and considered in the Sixty Third Congress in 1914. 51 Cong. Rec. 8790 (1914). During the House debate of May 18, 1914, the consequences of non-payment by the settlers was discussed (51 Cong. Rec. 8791 (1914)):

> Mr. FOSTER: I want to say to the gentleman from South Dakota, on the statement

> he makes that these lands will probably go back to the Government, and that these people are really in distress –
>
> Mr. MANN: The Government does not own these lands?
>
> Mr. BURKE of South Dakota: *The Government does not own them.* The Government is undertaking to dispose of these lands for the benefit of the Indians.
>
> Mr. FOSTER: Certainly. I understand.
>
> Mr. BURKE of South Dakota: *And instead of giving money to the Indians, under the agreement of 1889,* so far as these reservations in South Dakota are concerned, *the money goes into the Treasury,* and we appropriate it for the support and civilization of the Indians. [Emphasis added.]

The point was also emphasized later in the debate (*ibid.*):

> Mr. FOSTER: * * * if at the end of the time they do not desire to pay for them, the land goes back to the Government.
>
> Mr. MANN: *The land goes back to the Indians.* [Emphasis added.]

3. We believe that Congress expected by the Acts in question "to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished."

Martz v. *Arnett*, *supra*, 412 U.S. at 496. While it might have been possible to diminish the reservation *pro tanto* as each plot of land was actually sold, that system seems both illogical and impractical. Under such circumstances Indians could not be sure from day-to-day what lands remained within the Reservation (and thus on what lands they became subject to state jurisdiction, see U.S. Department of Interior, *Federal Indian Law* 510-511 (1958)), and jurisdiction could only be exercised in checkerboard fashion according to local plat books. That cumbersome system should not be readily implied. *Seymour* v. *Superintendent*, *supra*, 368 U.S. at 358. Furthermore, the risk of forfeitures was always present given South Dakota's climate; the difficulties would only be increased as land, previously sold and removed from the Reservation, reverted to the trust upon nonpayment. Finally, the Indians living on the opened portion might be denied benefits available to Indians living on a Reservation.

By contrast, preserving the Reservation until the trust allotments expired would present fewer problems. The acquisition of land would not be impeded, for the settlers would own their land in the same manner and would be generally subject to state civil and criminal jurisdiction. *United States* v. *McBratney*, 104 U.S. 621; *New York ex rel. Ray* v. *Martin*, 326 U.S. 496. The taxable base for the State and counties would be expanded, relieving the burdens of a locality previously inhabited largely by non-taxable Indians. At the same time, the Indians living on allotments

would continue to receive needed federal benefits. While the State, of course, would not have jurisdiction over Indians on the Reservation, extension of State control over Indians has not generally been favored, *Rice* v. *Olson*, *supra*. This viewpoint is also consistent with treatment of the Reservation by the Department of the Interior, as we next discuss.

III. THE DEPARTMENT OF THE INTERIOR HAS ADMINISTERED THE ROSEBUD RESERVATION IN ACCORDANCE WITH THE BOUNDARIES ESTABLISHED IN 1858

Although the State of South Dakota has asserted dominion over the opened portions of the Rosebud Reservation, the territory within the original boundaries of 1889 has been recognized and administered as a Reservation by the Department of the Interior.

1. The process of alienating "surplus" Indian lands pursuant to the allotment policy ended with the passage of the Indian Reorganization Act of 1934 (48 Stat. 984). *Mattz* v. *Arnett*, *supra*, 412 U.S. at 496, n. 18. Under Section 3 of that Act, the Secretary of the Interior was authorized "to restore to tribal ownership the remaining surplus lands of any Indian Reservation heretofore opened * * * ," 48 Stat. 984, and under Section 7, he was authorized to proclaim "new Indian reservations * * * or to add such lands to existing reservations." 48 Stat. 985. Congress made clear, however, that "[n]othing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads *upon the public domain*

outside the geographic boundaries of any Indian reservation now existing or established hereafter" (48 Stat. 986; Section 8) (emphasis added).

The legislative history of the Act establishes that its provisions were directed particularly to "opened" portions of reservations. John Collier, Commissioner of Indian Affairs, whose agency was largely responsible for drafting the original bills, testified:[17]

> There have been presented to the House Indian Committee numerous land maps showing the condition of Indian-owned lands on allotted reservations. The Indian-owned lands are parcels belonging (a) to allottees and (b) to the heirs of deceased allottees. Both these classes of Indian-owned land are checker-boarded with white-owned land already lost to the Indians, and on many reservations the Indian-owned parcels are mere islands within a sea of white-owned property.

Before the House Committee Commissioner Collier testifed[18]:

> * * Alienation under allotment takes place in a spotty way *throughout the entire area within the reservation.* Indian land is not lost in solid blocks. It passed into white hands in

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[17] Hearings on S. 2755 before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess. 18 (1934).

[18] Hearings on H R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess. 30-31 (1934) (emphasis added)

> scattered parcels which increased year by year until the remaining Indian lands are checker-boarded by white lands. *In many areas they have shrunk to mere dots on the map surrounded by large areas of white land.*

After passage of the Indian Reorganization Act of 1934 the unexpired trust period on all land allotted to Indians within reservations was indefinitely extended. The Secretary of the Interior was required to identify those Acts that "opened" portions of Indian Reservations but did not convert those lands into "public domain" (54 I.D. 559). The Secretary noted that many reservation lands had been ceded for a sum certain and concluded that "[t]he lands thereby separated from a reservation were no longer looked upon as being a part of that reservation" (54 I.D. at 560.) However, the Secretary determined that a second type of disposition did not extinguish the Indian title and convert the land into public domain (*ibid.*):

> * * * [A]bout 1890 * * * there was adopted the plan of opening to entry, sale, etc., the lands of reservations that were not needed for allotment, the Government taking over the lands only as trustee for the Indians. Under this plan the Indians were to be credited with the proceeds only as the lands were sold, the United States not to be bound to purchase any portion of the lands so opened. Undisposed of lands of this class remain the property of the Indians until disposed of as provided by law (*Ash Sheep Company* v.

> *United States*, 252 U.S. 159). Such lands are usually referred to as surplus lands of Indian reservations opened to public entry, and undoubtedly comprise the class of lands from which restorations to tribal ownership are to be made under the said Section 3, if in the public interest.[19]

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[19] Respondents' discussion of a 1938 opinion by the Acting Solicitor (56 I.D. 330), concerning the Colorado Ute Reservation. Reply Brief for Respondents' in Opposition, pp 26-27, takes an opposite viewpoint, replying on language that "[t]he phrase 'of any Indian reservation' must be used in section 3 to describe the character and location of the lands at the time they were opened to disposal under the public land laws," 56 I D. at 333. No mention is made, however, of the language in Section 8 that "[n]othing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside the geographic boundaries of any Indian reservation now existing or established hereafter." That qualification, read in conjunction with Section 3, indicates that the only lands governed by the Indian Reorganization Act were lands located within an Indian reservation that were opened but not restored to the public domain Such lands, as the Court held in *Seymour* and *Mattz*, were not removed from Indian and federal jurisdiction

Moreover, the lands at issue in the Colorado Ute case did not contain any Indian allotments Three bands of Utes occupied this Reservation prior to 1880; each was permitted to select allotments within the Reservation before it was opened by the 1880 Act, but because little arable land was available, the Uncompahgre and White River Utes were "voluntarily" removed to Utah. The Southern Utes were the only band to remain, and they selected allotments in the southern portion of the Reservation where the arable lands were located, *Ute Indians* v. *United States*, 45 Ct. Cl. 440, 449, leaving the northern portion unallotted. The discussion by the Acting Solicitor, therefore,

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The Secretary then proceeded to identify "a list of Indians to receive the proceeds of sale only as the reservations where the lands have been opened, the tracts are disposed of" (54 I.D. at 561).[20] In addition to the three Rosebud Acts of 1904, 1907 and 1910 (*id.* at 562), the Secretary listed some twenty-six other reservations.[21] While those reservations have been the source of continual litigation, not one court has ever held that the Indian title to the land affected was extinguished by the applicable Act of Congress and the land converted to public domain. In fact, when the question presented was whether the reservation boundaries continued to exist undiminished in size, each court decided that they had.

On December 3, 1937, the Assistant Commissioner of Indian Affairs recommended to the Secretary of the Interior that, pursuant to Section 3 and Section 7 of the Indian Reorganization Act, certain

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must be read in the context of these unusual facts. See also *Confederated Bands of Ute Indians* v. *United States*, 100 Ct. Cl. 413, 423, 424-430.

[20] Approximately one month later, a supplemental order was issued which included additional reservations. It stated that (*id.* at 564) "as to those townsites any part of which remains unsold within such areas, it is hereby recommended that said order * * * be construed to apply to the extent of temporarily withholding from other disposition any unsold lots or portions of any such townsites * * * ."

Thus, even townships, which by the 1930's would be populated by numerous non-Indians, were encompassed by this Interior Department order.

[21] See cases cited, note 10, *supra*.

undisposed surplus lands "of the Rosebud Reservation, South Dakota" should be restored to tribal ownership.[22] (App. A, *infra*). These lands included vacant lands totaling some 4,649.25 acres, and also "remaining vacant and undisposed * * * lots within the townsites of Wamblee, Witten and Wewela, in the opened portion of the said Rosebud Reservation, which townsites were established by the Department, pursuant to authority contained in the Act of March

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[22] The Secretary had previously approved the Constitution and Bylaws of the Rosebud Sioux Tribe (App. B, *infra*), pursuant to Section 16 (48 Stat 987) of the Indian Reorganization Act That section provides that "[a]ny Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws * * * " Article 1 of the Constitution defined the Tribe's jurisdiction as "the territory within the original confines of the Rosebud Reservation boundaries as established by the act of March 2, 1889, and to such other lands as may hereafter be added thereto under any law of the United States, except as otherwise provided by law " The Rosebud Sioux Tribe has had a law and order system since 1877, suported by Congressional appropriations. 19 Stat 254, 257 (Art 9). Its police force was organized in 1879, *Report of Commissioner of Indian Affairs*, 1879, p 40, and the extensive nature of its law and order system was recognized by this Court in *Ex parte Crow Dog*, 109 U S. 556 See also *Report of Commissioner of Indian Affairs*, 1881, p 54. Congress authorized the establishment of Tribal Courts in 1888, 25 Stat. 233, and the Rosebud law and order system continued to function thereafter. *Report of Commissioner of Indian Affairs*, 1897, p 277 and *Report of Commissioner of Indian Affairs*, 1890, p. 381. After the approval of the Tribal Constitution in 1935, the Tribal Government was reorganized, and the Tribe has continued to exercise jurisdiction throughout the 1889 Reservation over Tribal members. See App C, *infra*

2, 1907, *supra.*" *Id.* at 2A. The lands encompassed by this recommendation were in Tripp County, opened by the 1907 Act. On January 12, 1938, the Secretary issued an "Order of Restoration," restoring these lands to the Tribe (App. D, *infra*).[23]

2. Other actions confirm this view of the Rosebud Reservation as administered by the Department of the Interior. Department officials have repeatedly treated lands within Mellette, Tripp, Gregory and Lyman Counties, located within the 1889 Reservation boundaries, as reservation lands. This treatment belies the viewpoint of the court of appeals that Todd County alone has constituted the Rosebud Reservation since 1910.

For examples, in 1909, the Department, not having sold portions of the surplus lands made available by the 1904 Act to homesteaders, offered the remainder for sale at public auction. In a letter dated February 8, 1909, to the Commissioner of the General Land Office, the Secretary stated (37 I.D. 442-443):

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[23] On August 20, 1964, the Congress placed in trust status certain federal lands "on the Rosebud-Sioux Reservation," which included tract E ½ of Section 35, T. 42 N , R. 33 W. 6th P M in Mellette County. 78 Stat 560

Restoration orders, comparable to the 1938 Rosebud Order, were issued for the Colville Reservation, pursuant to a Congressional directive, 70 Stat 626 (1956), *Seymour* v *Superintendent, supra*, 368 U S. at 356, and the Klamath River Reservation, *Mattz* v. *Arnett*, 412 U.S at 496, n 17 and 505

> It is directed that *all that part of the Rosebud Indian reservation in Gregory County,* South Dakota, opened to settlement and entry by the act of April 23, 1904 (33 Stat. 254), which had not been entered prior to August 8, 1908, will be offered for sale * * *. [Emphasis added.]

The Department used similar language in 1913, directing sale of the lands opened by the 1907 Act:

> Sir: It is directed that all that *part of the Rosebud Indian Reservation in Tripp County,* South Dakota, opened to settlement and entry by the act of March 2, 1907 (34 Stat. 1230), which had not been disposed of on April 1, 1913, will be offered for sale at public auction * * * [42 I.D. 292].

Communications between Department officials are to the same effect. In April 1913, the Acting Commissioner of Indian Affairs, C. F. Hauke, submitted to the Superintendent of the Rosebud School a request for a report on the possible consequences of reorganizing the administrative structure of the Reservation. C.A. App. IV, Doc. 41.[24] Replying to the request, the Superintendent discussed, among other things, the status of Indian allotments in the various districts (or counties) opened for settlement. He stated (App. IV, Doc. 42, p. 4):

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[24] As used in this brief," "C.A. App." refers to the appendix filed in the court of appeals.

> *These two Districts* [Little White River and Black Pipe (both in Mellette County)] are the most troublesome of any of the Districts *on the Reservation.* The Bad Lands are located largely in these Districts which makes it difficult to go from place to place on account of the bad roads. The Cut Meat District [Todd County] has about 1,332 allotments with 299,120 acres, and a few over 1,000 Indians to look after. While it seems to be a large District, still there is but very little leasing of our Indian lands or allotments, *it being in the closed portion of our Reservation,* and the allotments are most compact with small farms in the District. The Agency has some over 1,200 Indians to look after, and is one of the largest Districts, but the farmer is assisted materially by being located in the Agency. [Emphasis added.][25]

That same year, the Supervisor of Industries and Agriculture for the Rosebud Reservation submitted a report to the Indian Office in Washington, D.C., regarding his inspection of portions of the Reservation. He stated (C.A. App. IV, Doc. 44, pp. 1-2):

> The reservation is divided into farmers' districts, and I believe an honest effort is

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[25] This correspondence shows that the distinction between "closed" and "opened" portions of the Reservation is that non-Indians were formally permitted by Congress to enter the Reservation in one portion (*i.e.*, "opened") while not others (*i.e.*, "closed"). Both parts, however, were administered as the Rosebud Reservation.

> being made to induce the Indians to farm; * * * In the *Ponca District* [Gregory and Tripp counties] *at the east end of the reservation* there is a Teacher in Charge residing at the Milk's Camp Day School. His duties are exactly the same as those of the additional farmers.
>
> Practically all of the day school teachers have been raising good gardens for a considerable time. * * * Except in the *Ponca District* [Gregory and Tripp counties] *at the east end of the reservation,* which is a farming district, I do not consider the Rosebud country a farming country. [Emphasis added.]

Moreover, the Report of May 13, 1914, from the Supervisor at Rosebud to the Honorable Cato Sells, Commissioner of Indian Affairs (App. IV, Doc. 51, p. 3), states:

> The [Rosebud] *reservation* is divided into seven farmer districts, each presided over by a farmer paid at a rate of $900 per annum, except the *Ponca district* [Gregory and Tripp counties] in the *extreme eastern end of the reservation,* which is presided over by a teacher-in-charge at $1000 per annum. [Emphasis added.]

Thus, the contemporaneous view of the Department officials was that the reservation boundaries were not changed by the Acts of 1904, 1907 and 1910.

More recently, in 1939, the Division of Forestry and Grazing of the Rosebud Reservation forwarded to

the Commissioner of Indian Affairs a "map of the Rosebud Indian Reservation showing different types of roads" and identifying important landmarks regarding the location of the roads (*e.g.*, schools, fire look-out stations) (App. E, *infra*). The letter identifies roads and trails constructed by either the County or the Indian Service in Mellette, Tripp, Lyman and Gregory Counties; the location of new schools in Black Pipe (Mellette); the location of fire look-out tower sites in Cedar Butte (Mellette); and the construction of government and private telephone lines in Mellette and Tripp Counties. These facilities all were considered part of the Reservation.

In 1942, the Interior Department's Fish and Wildlife Service undertook a wildlife survey on the Reservation in order to assist the Tribe in managing their resources (App. F, *infra*). The Report on the survey was completed in August 1942 and transmitted to the Commissioner of Indian Affairs in September. The Report contains this description of the Rosebud Reservation (*id.* at 39A-40A):

> The *entire reservation* is included in Tripp, Gregory, Mellette, and Todd Counties, and covers a gross area of 3,555,833 acres. Alienated white lands total 2,468,888 acres of this area. Most of the field work was conducted on the *so called* "Dimished Reservation" in Todd County. This area, including alienated land, totals approximately 894,080 acres. Much of this is checkerboarded although there are some large solid blocks of Indian land. The largest percentage of the

> diminished reservation is Indian owned. Approximately 7,000 Indians are enrolled in the tribe. [Emphasis added.]

The Bureau of Indian Affairs continued. prior to this law suit, to administer all five counties as part of the Rosebud Reservation. From 1969 through 1974 requests for Congressional appropriations were based on population statistics which included all Indians living within the exterior boundaries of the 1889 Reservation, and clearly distinguished those from a lesser number living off, but near the Reservation.[26] Various social services were provided to Indians living in all these counties, including child welfare and burial assistance; a BIA outpatient clinic is located in Mellette and Tripp Counties; and housing was provided by BIA or Tribal funding since 1963. Moreover, the Department of Housing and Urban Development, which makes grants only where a tribe has authority to act as a "governmental entity" or "public body" (42 U.S.C. 1460(h)), has been providing financial assistance to the Tribe (Memorandum of the United States as Amicus Curiae supporting petition for certiorari, p. 11). See also Opinion of the Field Solicitor on the exterior boundaries of the Rosebud Reservation in 1972 (C.A. App. IV, Doc. 56).

The agency responsible for administering the Rosebud Reservation, therefore, has greatly regarded

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[26] See App A, Brief of the United States as *Amicus Curiae* in the court of appeals below

the original reservation boundaries as unchanged by the Acts of 1904, 1907, 1910. That understanding is entitled to more weight than it was accorded by the court of appeals, *Martz* v. *Arnett*, *supra*, 412 U.S. at 505, and, we believe, is more instructive than the ambiguous legislative history discussed in the following section.

IV. THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS DID NOT CONSIDER QUESTIONS OF JURISDICTION AND IS THEREFORE OF MARGINAL BENEFIT IN THIS CASE

The court of appeals gave primary, if not conclusive, weight to the legislative history of the three Acts (Pet. App. 9-60).[27] While legislative history may be useful in these inquiries, *DeCoteau*, *supra*, 420 U.S. at 444-445, we do not believe the history in this case merits the emphasis it enjoyed below. For Congress, in passing these three Acts, at no time addressed the question of jurisdiction. Page after page of the legislative history shows that Congress was concerned with *land* not *jurisdiction*. Thus, that history is at best a slender reed on which to support extinction of most of the Rosebud Reservation.

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[27] A law journal article, written in part by present counsel for South Dakota, had previously reviewed the legislative history in some detail and urged the result reached below. Comment, *New Town, et al.: The Future of an Illusion*, 18 S.D. L. Rev. 85 (1973).

During the early 1900's there was no reason for Congress to be greatly concerned about jurisdiction. The principal reason for opening the Rosebud Reservation, as the court of appeals recognized (Pet. App. 9, 34, 44), was the desire of settlers for land. This desire was compatible with the interests of States having great reservations within their boundaries, who sought a broader tax base through increased land ownership by non-Indians (*e.g.*, A. 276). Both objectives could be accomplished either by purchase for a lump sum or by purchase through the uncertain-sum-in-trust method. At the same time, the Indians would be exposed to new, presumably more civilized, ideas that would hasten their assimilation into our culture. As that assimilation occurred, and the trust period on allotted lands gradually expired, the Reservations could be abolished. *Mattz*, *supra*, 412 U.S. at 496.

The debates reflect Congress' lack of attention to jurisdictional matters. Throughout the consideration of these three Acts, Congress discussed the desirability of the lands, the method of payment, the price to be paid by settlers, the need for school lands provisions, and many other matters, but not once addressed the issue of criminal and civil jurisdiction within the opened Reservation.[28] Although the court

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[28] Jurisdiction is mentioned, albeit tangentially, in the debate on the liquor provision in the 1910 Act. That provision made all land in Mellette County subject to the liquor laws applicable in "Indian Country." Although the courts below suggested that the provision would be unnecessary if the Reservation were continued (Pet. App. 56-58, 102-103), that

(Continued on following page)

of appeals relied on scattered remarks that suggest abolition of the Reservation, these remarks are necessarily taken from discussions on different subjects and are often contradicted by other references of a similar nature. While exhaustive citation is not necessary, a brief review of materials not cited by the courts of appeals should demonstrate the uncertainty surrounding the legislative history in this case.

1. The view of the legislative history taken by the court of appeals proceeds from the assumption that the Acts of 1904, 1907, and 1910 were extensions of the unratified 1901 Agreement (Pet. App. 22, 23, 25, 38, 40, 48). Although we agree that the 1901 Agreement and the three Acts had a common purpose of providing Indian lands to white settlers, the differences between them merit further attention.

In 1901, the Rosebud Sioux Tribe agreed by a three-fourths majority of the adult male population to "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest" in all that part of the Reservation located in Gregory

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suggestion is erroneous. As the debates show, 45 Cong. Rec. 5460-5464 (1910), members of Congress were fully aware of this Court's decision in *In re Heff*, 197 U.S. 488, holding that Indian allottees were subject to *state* liquor laws. While opponents of the provision believed that state jurisdiction was sufficient, supporters noted that dependency on state liquor laws presented a grave risk to Indian well-being (45 Cong. Rec. 5460-5464 (1910)). Thus federal control was expressly continued for twenty-five years, the trust period on Indian allotments, at which time abolition of the Reservation could be considered.

County, South Dakota, remaining unallotted, in return for a lump sum payment of $1,040,000 (Pet. App. 14 and 15, n. 21). This agreement, which was negotiated by the Interior Department's Inspector, James McLaughlin, was to be effective "when accepted and ratified by the Congress of the United States" (id. at 15).[29] That ratification of course never occurred.

Three years later, after several previous bills had failed to pass, a new bill was introduced which unilaterally "amended and modified" the 1901 Agreement. The primary amendments were that (1) the Indians were not guaranteed a lump sum consideration, except for Sections 16 and 36 (school sections), but were to be paid as lands were actually sold (Section 6, Pet. App. 120); (2) the United States did not guarantee to find purchasers but agreed only to "act as trustee for said Indians to dispose of said lands" (Section 6, Pet. App. 120); and (3) limitations were placed on the distribution of the proceeds to the Indians (compare Art. III, Pet. App. 118 with Art. III, Pet. App. 115-116). In addition, the 1904 bill eliminated any reference to tribal consent by three-quarters of the male adults, and included a provision granting Sections 16 and 36 to the State for

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[29] Approval of three fourths of all the adult male Indians, before an agreement was considered valid, was required by the Treaty of 1868, 15 Stat. 635, 639 (Art. XII) (Pet. App. 14, n. 20).

common school purposes (Section 4, Pet. App. 120). It was enacted on April 23, 1904, 33 Stat. 254.[30]

Although the court of appeals stated that "[t]he 1904 Act, incorporating the entire text of the 1901 Agreement (save for the lump-sum provision) passed under the circumstances [previously discussed], was obviously an outgrowth of and a continuation of the objectives of the 1901 Agreement" (Pet. App. 25), that conclusion, while technically correct, is misleading. The 1901 Agreement itself does not evidence a specific intention to cut down reservation boundaries; at most, that intention could be presumed from the bilateral nature of the agreement and by the provisions for outright purchase of the lands for an indicated sum. *DeCoteau, supra*. That presumption is unavailing, however, once the nature of the agreement and the method of payment are changed. The objective of securing new lands for non-Indian settlers surely was continued, but that is not material to the question of jurisdiction over the settled lands.

2. The court of appeals also proceeded on the assumption that the terms "reservation" and "diminished reservation" had one settled, precise meaning throughout the legislative history. Thus, the court relied heavily on various references to the

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[30] Despite these numerous and material changes the court of appeals somehow concluded that the 1904 Act "amended the 1901 Agreement solely with respect to the method of payment" (Pet. App. 23).

"reservation" and the "diminished reservation" (Pet. App. 12, 13, 14, 26-28, 39, 40-41, 44, 45, 51-52, 54, 57, 58, 59) to show that the exterior boundaries of the Rosebud Reservation had been cut back. Consideration of similar references in the legislative history, however, indicates that the terms were often used in shorthand fashion without the precision that the court of appeals supposed.

For example, the term "diminished reservation," as used in the 1910 Act, appears to include not only Todd County (the closed portion) but also Mellette County (the portion to be opened). The May 30, 1910 Rosebud Act provides in part, 36 Stat. 449 (Section 1):

> [A]ny Indians to whom *allotments* have been made *on the tract to be ceded* [Mellette County] may, in case they elect to do so *before* said lands are offered for sale, relinquish same and select allotments in lieu thereof on the *diminished reservation* * * *. [Emphasis added.]

Section 2 of the Act, however, directs the Secretary to dispose of the unallotted lands in Mellette County after a presidential proclamation, provided (*ibid*):

> That prior to said proclamation the *allotments within the portion* of the said Rosebud Reservation *to be disposed of* [Mellette County] as prescribed herein shall have been completed * * *. [Emphasis added.]

Since the Indians could select new allotments in Mellette County prior to the presidential

proclamation, as well as in Todd County, "diminished reservation" seems to refer not merely to the closed portion of the Reservation but to the "'area of the reservation * * * diminished in size by reason of the settlement of the unalloted lands by non-Indians.'" *Putnam* v. *United States*, 248 F. 2d 292, 295 (C.A. 8). In *United States ex rel. Condon* v. *Erickson*, 478 F. 2d 684, 687 (C.A. 8), the court of appeals recognized that a similar use of the term could mean that "the reservation * * * retained its original exterior boundaries even though the portion held by Indians was diminished by virtue of the sale of lands within the boundaries to outsiders. The court then continued: "Indeed, this would be consistent with 18 U.S.C. § 1151 defining Indian Country as lands within the limits of a reservation *notwithstanding the issuance of any patent*" (*ibid.*; emphasis in original).[31]

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[31] In a November 12, 1910, letter regarding the 1910 Act, the Assistant Commissioner of Indian Affairs stated (C.A. App. IV. Doc 40B)

"The diminished reservation, – that is, the lands remaining *after* the allotments [to Indians] and sale of lands [to homesteaders] referred to, *will consist of about 40 townships*, which may be used to provide allotments until such time as there are no unallotted lands therein." [Emphasis added]

In 1910 Mellette County consisted of 837,125 acres (36 full townships) and a number of irregularly sized townships. Thousands of these acres had already been allotted to Indians *prior* to the opening, and could not "be used to provide allotments * * * " *after* the opening To find "about 40 townships" available for allotment, therefore, it would be necessary go beyond Mellette County

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At other times, "diminished reservation" seems to mean only the closed portion of the Reservation. The Report prepared by the Fish and Wildlife Service in 1942 (App. F, *infra*, at 39A), for example, states that "[t]he entire [Rosebud] reservation is included in Tripp, Gregory, Mellette, and Todd Counties," and notes that "[m]ost of the field work was conducted on the so called 'Diminished Reservation' in Todd County." This is the same portion of the Reservation that the Superintendent of Rosebud School described as "the closed portion of our Reservation * * * " (*supra*, p. 35).

Construction of the term "reservation" also leads in various directions. While some references to the Rosebud "reservation" appear compatible with the court of appeals' analysis, other references do not. Thus, within a year after the 1904 Act was passed, the homesteaders in Gregory County petitioned Congress for an extension of time to establish their residence upon lands opened to settlement. The Senate and House Committee Reports both refer to

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In 1911, a few months after Mellette County was opened to settlement, there existed in Todd County less than 220,000 acres that could "be used to provide allotments * * * " to Indians, S. Rep. No. 1166, 62d Cong., 3d Sess. 4 (1913), the remainder having long since been allotted or reserved for agency and school purposes. The remaining 700,000 acres referred to by the Assistant Commissioner appears to have been an estimate from existing Department records of the land remaining throughout the entire 1889 Reservation for the purpose of allotment, "diminished" by the lands already alloted to Indians or occupied by homesteaders

the lands in question as "*lands within the confines of that part of the Rosebud Indian Reservation* thrown open to entry * * * (emphasis added). H.R. Rep. No. 4198, 58th Cong., 3d Sess. (1905); S. Rep. No. 2760, 58th Cong., 3d Sess. (1905) And, after describing the need for the legislation in light of bad climatic conditions causing delays in payments by homesteaders, the Senate Committee Report states (*id.* at 2):

> A further fact which influences the committee in making a favorable report is that these settlers are under conditions different to those affecting the ordinary homestead settler. Entrymen on the reservations in question have to pay $4 an acre in the case of the Rosebud Reservation * * * .

This legislation became law on February 7, 1905, 33 Stat. 700.

On March 3, 1909, Congress enacted an appropriation for the Indian Department for the fiscal year ending June 30, 1910. 35 Stat. 781. Under Section II of the Act, Congress made appropriations for reservations within various states, including South Dakota. 35 Stat. 808. Additionally, Congress authorized the Secretary to permit the establishment of catholic missions "on the Rosebud Reservation." 35 Stat. 809. The missions were to be located as follows (*ibid.*):

> *On the Rosebud Reservation,* at or near Saint Francis Mission * * * ; also, at or near Red Leaf Camp * * * ; also, at or near Oak Creek * * * ; also, at or near Antelope Creek * * * ; also, at or near Little White River

> * * * ; *also, at or near Ponca Creek.* [Emphasis added.]

Ponca Creek is located in Gregory County, opened by the Act of 1904.

In 1911 Congress had before it a bill for relief of settlers in the area opened by the Act of 1907. Representative Stephens, who called up the bill, described it as a "bill (H.R. 13044) extending the time of payment to certain homesteaders in the Rosebud and other Indian reservations in South and North Dakota * * * " (47 Cong. Rec. 3840 (1911)) and then stated (*id.* at 3841):

> Mr. Speaker, we have gone at some length into the question of the great drought-striken country of the West in the bill which has already passed the House and we have shown the House beyond all question that a severe drought has extended all over the West, including South Dakota. *The Rosebud Reservation, where these lands are situated,* is now, in the main, in the hands of settlers * * * . [Emphasis added.]

The bill became law on April 17, 1911, 37 Stat. 21.

In 1918, Mr. Gandy, a representative from South Dakota, introduced a bill (H.R. 12082) ("authorizing the sale of certain lands in South Dakota for cemetery purposes." 56 Cong. Rec. 6469 (1918). The bill was referred to the Committee on Indian Affairs, which reported (H.R. Rep. No. 742, 65th Cong., 2d Sess. 1 (1918)):

> This is a bill to authorize the sale of 10 acres of tribal land *on Rosebud Indian Reservation in Mellette County S. Dak., and belonging to the Rosebud Tribe of Indians,* to the White River Cemetery Co. * * * It is provided that the Secretary of the Interior shall sell the land * * * and that the money received shall be deposited in the Treasury of the United States to the credit of the Rosebud Tribe of Indians. [Emphasis added.]

In the following year, during debate on a bill to pay for fire damages on the Todd County portion of the Rosebud Reservation, 58 Cong. Rec. 4933 (1919), Mr. Gandy observed that "[t]he Rosebud Reservation embraces about 7,000 square miles." However, Todd County, which the Eighth Circuit found to be the *only* portion of the original Rosebud Reservation remaining in 1919, is less than 1,500 square miles (approximately 800,000 acres). The 1889 Rosebud Reservation, undiminished in size, is in excess of 5,000 square miles (3,228,160 acres).

In December 1910, the Town of White River, located in Mellette County, South Dakota, sought approval from the Federal Power Commission for construction of an electric power line across Indian lands. The FPC notified the Town that if "tribal Indian lands are to be crossed * * * prior approval of the proper reservation authorities" was required (App. G, *infra,* p. 41A). The FPC then notified the Secretary of the Interior that the "Town of White River, South Dakota, has filed with the Commission an application for license * * * affecting lands of the

United States within the Rosebud Indian Reservation" (App. G, *infra,* p. 42A). Thus, both the Town of White River and the FPC acknowledged that power line construction in Mellette County would affect lands within the Reservation and was subject to approval of "reservation authorities."

In June, 1941, the United States filed a Declaration of Taking in the United States District Court for the District of South Dakota, in order to acquire land "for the use of the United States of America, * * * in connection *with the Two Kettle Project on the Rosebud Indian Reservation in South Dakota* * * * " (App. II, *infra,* pp. 44A, 50A) (emphasis added.) The lands acquired were described the District Court as (*id.* at 50A)

> * * * containing 610.10 acres of land, more or less, *in Mellette County,* South Dakota, designated as Tract No. 189 of the Two Kettle Project *on the Rosebud Indian Reservation* [Emphasis added.]

The District Court entered its Findings of Fact and Conclusions of Law, as well as its final judgment, on December 12, 1941 (*id.* at 44A).

In 1945 Senator Bushfield, a Senator from South Dakota, introduced a bill (S. 1564) directing the Secretary of the Interior to issue a fee patent to Shadrick Ponca, a Rosebud Sioux Indian. The relevant Committee Report stated (S. Rep. No. 1442, 79th Cong., 2d Sess. 1 (1946))

> Shadrick Ponca, is the sole heir of his deceased mother, Millie or Wing Ponca, who bequeathed to him her allotted lands *on the Rosebud Indian Reservation, S. Dak., described in this bill, which lands are situated in Gregory County, S. Dak.*, a distance of more than 50 miles from applicant's home in the village of Okreek, in Todd County, S. Dak., where applicant, Shadrick Ponca, lives in his own home * * * .[32]

Two years later, Senator Bushfield asked the Commissioner of Indian Affairs for a report on the application of Charlotte Gordon Odden for a patent in fee covering her allotment in Tripp County, South Dakota. The Commissioner stated in his letter of August 21, 1947 (App. I, *infra*):

> Receipt is acknowledged of your letter of August 11 about Mrs. Charlotte Gordon Odden's application for a patent in fee covering her 160-acre allotment, No. 4248, *on the Rosebud Reservation, described as* the SW ¼ sec. 11, T. 96N., R. 74W., 5th P.M., *Tripp County, South Dakota.* [Emphasis added.]

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[32] The bill was passed by the Senate on June 14, 1946, 92 Cong. Rec. 6920, introduced into the House, 92 Cong. Rec. Rec. 7120, and referred to the House Committee on Indian Affairs 92 Cong Rec 7399-7400 There was no further action during the 79th Congress, and although the South Dakota Senator introduced it again in the 80th Congress, 93 Cong. Rec 3219 (1947), it did not become law

The inconsistency in these references is not surprising in view of the fact, discussed previously, that Congress did not squarely face the question of jurisdiction over the opened lands; other more controversial matters claimed its attention. It is inappropriate, therefore, to select certain statements from the mass of ambiguous materials and draw inferences from these, as the courts below did.[33]

Read in its entirety, the legislative history does not show a clear intent to cut back the Reservation boundaries.

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[33] We also think the court of appeals misapprehended the significance of the fact that non-Indians and Indians live within the Reservation and utilize State and Federal facilities or benefits. Neither fact is inconsistent with the continued existence of the Rosebud Reservation. Only 19% of the Flathead Tribe live within the Flathead Reservation in Montana. *Confederated Salish and Kootenai Tribes* v. *Namen*, 380 F. Supp. 452, 457, n. 5 (D. Mont.), and considerable expenditures by both the State and Federal governments within the area provide benefits to all residents. *Confederated Salish and Kootenai Tribes* v. *Moe*, 392 F. Supp. 1297, 1313-1314 (D. Mont.). Similarly, the entire City of Tacoma, Washington, is within an Indian Reservation (Brief of the United States as Amicus Curiae in Support of Petition for Rehearing and Rehearing en Banc, p. 95 (filed in court of appeal); see also *United States* v. *Washington*, 496 F.2d 620 (C.A. 9), certiorari denied, 419 U.S. 1032), and this Court recognized the presence of non-Indians within the Colville Reservation. *Seymour* v. *Superintendent, supra*, 368 U.S. at 358-359. This pattern represents nothing more than the logical consequence of Acts "opening" Indian reservations to white settlement around the turn of the century.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER R. TAFT,
Assistant Attorney General.

H. BARTOW FARR,
Assistant to the Solicitor General.

EDMUND B. CLARK,
NEIL T. PROTO,
Attorneys.

SEPTEMBER 1976.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 82-1253

HERMAN S. SOLEM, WARDEN, and
MARK V. MEIERHENRY, ATTORNEY GENERAL
OF SOUTH DAKOTA, PETITIONERS

v.

JOHN BARTLETT

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The special relationship of the United States to the Indian Tribes is too familiar to require restatement. It precedes the Constitution, was confirmed by it, and is evidenced in a long course of treaties and Executive Orders. The attendant national powers and duties are particularized in a multitude of Acts of Congress. Of immediate relevance here is the status of a remnant of the Great Sioux Reservation – itself established by treaty in 1868 and later reduced and

broken up into segments by congressional legislation in 1889 – as it may have been further diminished by an Act of 1908. The result will affect, inter alia, the continuing federal responsibility for law enforcement within the disputed area under 18 U.S.C. 1152 and 1153.

In light of this continuing federal interest, the Court invited the Solicitor General to file a brief expressing the views of the United States at the jurisdictional stage. Now that the case is to be heard on the merits, we deem it appropriate to make a further submission.

STATEMENT

1. Respondent John Bartlett, an enrolled member of the Cheyenne River Sioux Tribe, pleaded guilty in 1979 in a South Dakota state court to a charge of attempted rape. The crime took place on an alienated parcel of land in Eagle Butte, South Dakota, which lies within the portion of the original Cheyenne River Indian Reservation that was opened to settlement by the Act of May 29, 1908, ch. 218, 35 Stat. 460 *et seq.* Pet. App. A2-A3.[1] After Bartlett's request for

[1] The Reservation was once part of the Great Sioux Reservation, established by the Treaty of Apr. 29, 1868, 15 Stat. 635 *et seq.*, from which the Black Hills area was taken in 1877. Act of Feb. 28, 1877, ch. 72, 19 Stat. 254 *et seq.* The Cheyenne River Reservation emerged as a separate unit in 1889, when another substantial portion of the large Reservation was ceded and the remainder was carved up into six distinct Reservations. Act of

(Continued on following page)

post-conviction relief was denied by the South Dakota court in which he had entered his plea (Pet. App. A2 n.1), he filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. (Supp. V) 2254, in the United States District Court for the District of South Dakota. There, he contended that the crime was committed in "Indian country", as defined in 18 U.S.C. (Supp. V) 1151, and that, accordingly, exclusive jurisdiction to prosecute him rested with the Sioux Tribe or the federal government. The State of South Dakota, on the other hand, argued that the 1908 Act terminated the reservation status of the portion opened to sale to non-Indians and divested the Tribe and the United States of jurisdiction over alienated lands in that area. Pet. App. A2-A3.[2]

2. The district court applied the rulings of the Court of Appeals for the Eighth Circuit in *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (1973),

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Mar. 2, 1889, ch. 405, 25 Stat. 888 *et seq.* See *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 589 (1977). As defined in 1889, the Cheyenne Sioux Reservation comprised about 2.8 million acres. The area opened in 1908 embraces some 1.6 million acres.

[2] It was correctly assumed by both parties that, having chosen not to invoke the option offered by Public Law 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 *et seq.*, as amended in 1968, now 18 U.S.C. 1162, 25 U.S.C. 1321-1326, 28 U.S.C. 1360), South Dakota could exercise no criminal jurisdiction over a tribal member within "Indian country," which includes alienated parcels embraced by federally recognized Indian Reservations. See *Williams* v. *United States*, 327 U.S. 711, 714 (1946); *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *United States* v. *John*, 437 U.S. 634 (1978).

and *United States* v. *Dupris*, 612 F.2d 319 (1979), vacated and remanded, 446 U.S. 980 (1980), to the effect that the Cheyenne River Indian Reservation was not disestablished or diminished by the 1908 Act. Therefore, despite contrary decisions by the South Dakota Supreme Court,[3] the district court held that the State was precluded from exercising its criminal jurisdiction over Bartlett since the opened portion remained "Indian country" within the meaning of 18 U.S.C. (Sapp. V) 1151. The court granted the writ of habeas corpus, but stayed the effect of its decision pending the outcome of any appeal. Pet. App. A1-A8, A96-A97.

3. The court of appeals, sitting en banc, affirmed (Pet. App. A9-A11), Judges McMillian and Arnold dissenting (Pet. App. A11-A12).[4] The court declined to overrule *United States* v. *Dupris*, and found that *Dupris*, *United States* v. *Long Elk*, 565 F.2d 1032 (8th Cir. 1977), and *United States ex rel. Condon* v. *Erickson*, were consistent with this Court's decision in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977). Pet. A10-A11.

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[3] *South Dakota* v. *Janis*, 317 N.W.2d 133 (1982); *Stankey* v. *Waddell*, 256 N.W.2d 117 (S.D. 1977).

[4] The United States, the Cheyenne River Sioux Tribe, and the Standing Sioux Tribe participated as amici curiae in support of Bartlett. The Counties of Dewey, Corson and Ziebach, South Dakota, and Sioux County, North Dakota, participated as amici curiae in support of the State.

INTRODUCTION AND SUMMARY OF ARGUMENT

The only issue before the Court is the continuing status as "Indian country" of a portion of one Indian Reservation in South Dakota. That question has been squarely decided against the claim of "diminishment" or "disestablishment" in at least three holdings of the Court of Appeals for the Eighth Circuit, *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (1973); *United States* v. *Dupris*, 612 F.2d 319 (1979), and the present case. See also, *United States* v. *Fay*, 668 F.2d 375 (1981), affirming in part a criminal conviction under 18 U.S.C. 1153 in respect of offenses committed at Eagle Butte without discussion of the jurisdictional issue. The first of these decisions has been cited and quoted with approval in *Mattz* v. *Arnett*, 412 U.S. 481, 497 n.19, 505 (1973), a precedent since reaffirmed by this Court. See *DeCoteau* v. *District County Court*, 420 U.S. 425, 444, 447-449 (1975); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586-587 (1977). What is more, on two occasions, the Eighth Circuit has expressly revisited its seminal *Condon* decision in light of this Court's more recent *DeCoteau* and *Rosebud* rulings and the contrary holdings of the South Dakota Supreme Court and has determined to adhere to its conclusion. *E.g.*, *United States* v. *Long Elk*, 565 F.2d 1032, 1034-1040 & n.10 (1977); *United States* v. *Dupris*, 612 F.2d at 321-323. And, now, after reconsidering the matter en banc, that court has firmly settled the question.

In this situation, there would normally be no occasion for further review. In *Seymour* v. *Superintendent*, 368 U.S. 351 (1962), *Mattz*, *DeCoteau* and *Rosebud*, this Court announced the governing guidelines. These have remained unchanged. As the Court was at pains to declare in *DeCoteau* (420 U.S. at 447), "[w]e adhere without qualification to both holdings [*Seymour* and *Mattz*] and the reasoning of those decisions." No one can doubt that the court below has been meticulous in its attempt faithfully to apply those standards in each situation. It was, we stress, the Eighth Circuit that first found diminishment in the case of the Rosebud Reservation. *Rosebud Sioux Tribe* v. *Kneip*, 521 F.2d 87 (1975), aff'd, 430 U.S. 584 (1977). The court of appeals was then credited with a "careful and comprehensive opinion." 430 U.S. at 585. After giving the matter equally full consideration on three occasions, it cannot be faulted for reaching a different result, on different facts, in the case of the Cheyenne River Reservation.

We cannot suppose this Court is now inclined to reconsider its own decisions and to revisit every lower court ruling implementing them – especially those previously cited with approval.[5] Acquiescing in that invitation – apparently tendered by petitioners –

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[5] In *Mattz*, this Court listed the 1908 Act involved here as an example of an "opening" statute that did not work disestablishment and approvingly cited the Eighth Circuit's *Condon* decision, followed in this case. 412 U.S. at 497 n.19, 505 n.23.

would impose an awesome burden and entail very unsettling consequences for all concerned, Indians and non-Indians alike. Rather, we assume the Court has determined to review the present case because of the conflicting decisions of the South Dakota Supreme Court. *Stankey* v. *Waddell,* 256 N.W.2d 117 (1977); *South Dakota* v. *Janis,* 317 N.W.2d 133 (1982). Thus far, that court has declined to accept the ruling of the federal appellate court as settling this issue of federal law. Apparently, the South Dakota Supreme Court was most recently emboldened (in *Janis)* by this Court's action (446 U.S. 980 (1970)) vacating the Eighth Circuit's *Dupris* decision as probably moot.[6] See 317 N.W.2d at 137-138. At all events, now that the Court has granted review, it is to be hoped that a clear message will emerge, discouraging other state courts from prolonging disruptive controversies over the status of Indian Reservations. We urge the Court to re-affirm the controlling standards and to conclude that they were correctly applied by the court of appeals.

A.

We begin by re-examining the Court's past decisions in an attempt to distill the general principles that govern issues of Reservation "termination,"

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[6] On remand, the case was ultimately mooted by the court of appeals' direction to the district court to grant the government's motion to dismiss the information against Dupris 664 F.2d 169 (1981)

"disestablishment," or "diminishment." The critical question remains whether the statute invoked worked an immediate and irrevocable cession, or merely opened up a part of the Reservation to purchase by settlers, with the expectation that, in due course, the entire opened area would be acquired and then separated from the remaining Indian territory. Our submission is that where such an opening scheme substantially failed and a significant portion of the opened lands remained unsold when Congress changed policy and halted sales, the area retains Reservation status.

B.

Applying these guidelines to the present case, we conclude that the Cheyenne River Reservation has not been disestablished or diminished. The Act of 1908 involves no outright cession, nor even any agreement by the Tribe. It is, rather, a typical "opening" statute, indistinguishable from the legislation considered in *Seymour* and *Mattz*. And, unlike the result in *Rosebud*, most of the opened lands were never sold and were ultimately "restored" to full Reservation status. In other respects, also, the opened area of the Cheyenne River Reservation has remained Indian. In these circumstances, it seems consistent with both the historic intent of Congress and more recent legislative policy to preserve the original boundaries of the Reservation.

ARGUMENT

A. The Governing Principles

1. In considering questions relating to the "termination," "disestablishment" or "diminishment"[7] of Indian Reservations, we must remember that they almost inevitably arise out of congressional legislation enacted near the turn of the last Century, a time when the Political Branches were wholly committed to a policy designed, in due course, to liquidate the Reservation system and accomplish the assimilation of the Indian. The first step, exemplified by the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388 *et seq.*, was to encourage – and shortly to compel – the Indian to abandon his roaming habits, his communal life, his "tribalism," and to become a self-sufficient farmer, tied to a homestead.[8] To that end, property ownership was to be individualized, and the not unimportant side benefit of allotting the

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[7] Like Petitioners, we speak of "diminishment" as synonymous with "disestablishment" and "termination," but as applied to a discrete portion, rather than the whole of the Reservation. So used, all three terms imply that the affected area has entirely and permanently lost its Reservation status. In the case of "diminishment," the affected portion is jurisdictionally removed from the subsisting Reservation, whose boundaries are redrawn to exclude that area. It does not, of course, follow that the same meaning should be attributed to the word "diminished" whenever it occurs in Legislative or Executive Branch documents

[8] There were, to be sure, much earlier experiments with allotment, mainly with the same objectives as the later legislation But few such plans were fully carried out See F. Cohen, *Handbook of Federal Indian Law* 98-102, 129-130 (1982 ed).

Reservation land among the members would be to open up the substantial "surplus" to white settlers. Although the precise mechanisms varied, the ultimate objectives were always the same: "educating" and "civilizing" the Indian, relieving the federal Treasury of burdensome annual subsidy payments, and releasing "unneeded" tribal land for exploitation by others. In every case, moreover, the expectation was that, sooner or later, perhaps within a generation, the Tribe and its Reservation would cease to exist. See generally, F. Cohen, *Handbook of Federal Indian Law* 206-217 (1942); J. Kinney, *A Continent Lost – A Civilization Won* (1937); D. Otis, *History of the Allotment Policy*, reprinted in Hearings on H.R. *7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess., Pt. 9, at 428 *et seq.* (1934). See also, *Montana* v. *United States*, 450 U.S. 544, 559-560 n.9 (1981).

This perception might lead us to view as disingenuous all attempts at pursuing the exact intent of Congress in the period of 1890 to 1910 when it allotted and opened up particular Reservations. Disregarding fine points, one might be tempted to rush to the conclusion that the Congressional purpose was plain enough in each instance: termination or "disestablishment" of the Reservation, merely preserving for a limited time in protected status individual Indian homesteads. The upshot of this indiscriminate approach would be to end the Reservation status of

every Reservation that has ever been allotted – some four-fifths of the total.[9] While individual allotments held in trust or subject to restrictions would continue to be "Indian country" (see 18 U.S.C. (Supp V) 1151(b)), the territorial integrity of most Reservations would be destroyed, tribal governments would lose much of their reason for being, and all the problems associated with "checkerboard" jurisdiction would emerge.

To acquiesce in these results would break many solemn treaty promises made to the Indian, and, at this late date, the unsettling effect would be extreme. But the dispositive consideration is that reading an intent immediately to disestablish into every turn of the century statute providing for the allotment and opening up of Indian Reservations would attribute to Congress and the Executive a more callous disregard of Indian welfare than the record justifies. Latter-day popular history exaggerates when it portrays the Government of the United States as wholly captive to the "familiar forces" of the times, ready to take the Indian's land by any means and without concern for his fate. As this Court stressed in *Mattz* v. *Arnett,* 412

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[9] According to one compilation, of the 229 Indian Reservations existing in 1936 (which comprised approximately 136 million acres in 1887), only 48 (totalling about 22 million acres) escaped allotment and opening up With the notable exception of the Navajo Reservation (encompassing some 16 million acres in 1936), most of the unallotted Reservations were relatively small. See J Kinney, *A Continent Lost – A Civilization Won,* App at 350 (table), 351-356 (table) (1937).

U.S. 481, 496 (1973), although elimination of separate Reservations was the *ultimate* goal, the actual consequence of allotment was often to "continue the reservation system" for a limited time. See, also, *Moe* v. *Salish & Kootenai Tribes,* 425 U.S. 463, 478-479 (1976).

So, also, to hold that all Reservations opened up in this period were then permanently disestablished would trivialize the effect of the Indian Reorganization Act of 1934, 25 U.S.C. (& Supp. V) 461 *et seq.* (IRA), and more recent legislation, which radically changed our approach to Indian affairs. See, *e.g.*, *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 151-158 (1973); *Mattz,* 412 U.S. at 496 & nn.17 and 18; *Moe,* 425 U.S. at 472-478; *Bryan* v. *Itasca County,* 426 U.S. 373, 388-389 n.14 (1976). Except as it is unavoidable, we ought not conclude that the remedy came too late for most Indians and most Reservations. This Court "cannot remake history." *DeCoteau* v. *District County Court,* 420 U.S. 425, 449 (1975); *Rosebud Sioux Tribe* v. *Kneip,* 430 U.S. 584, 615 (1977). But, where implementation was not completed, the Court need not carry forward into the 1980s a policy so firmly repudiated by Congress since the 1930s. See *Moe,* 425 U.S. at 478-479.

This is not "revisionism." As early as 1884 this Court entertained "no doubt" that, until the lands opened to settlers were sold, the Indians remained the equitable owners and that such areas could not be deemed "public lands." *United States* v. *Brindle,* 110 U.S. 688, 693 (1884). A few years later, the reserved

status of similar lands was held to defeat a state's claim to included school sections. *Minnesota* v. *Hitchcock*, 185 U.S. 373, 394-402 (1902).[10] See, also, *United States* v. *Thomas*, 151 U.S. 577 (1894); *Wisconsin* v. *Hitchcock*, 201 U.S. 202 (1906). By 1909, the Court had established a presumption against termination or diminishment of Reservations and the elimination of the protective federal umbrella. *United States* v. *Celestine*, 215 U.S. 278, 285-287, 290-291; *United States* v. *Sutton*, 215 U.S. 291, 294-295. See, also, *Spalding* v. *Chandler*, 160 U.S. 394, 403-405 (1896). And, in the next three decades, there followed a host of decisions reflecting the same solicitude to maintain the special status of Indian land. *E.g.*, *Hollowell* v. *United States*, 221 U.S. 317 (1911); *Choate* v. *Trapp*, 224 U.S. 664 (1912); *Ex parte Webb*, 225 U.S. 663 (1912); *Donnelly* v. *United States*, 228 U.S. 243 (1913); *United States* v. *Mille Lac Band of Chippewas*, 229 U.S. 498, 509 (1913); *United States* v. *Sandoval*, 231 U.S. 28 (1913) (disapproving *United States* v. *Joseph*, 94 U.S. 614 (1877)); *United States* v. *Pelican*, 232 U.S. 442 (1914); *United States* v. *Nice*, 241 U.S. 591 (1916) (overruling *In re Heff*, 197 U.S. 488 (1905)); *United States* v. *Soldana*, 246 U.S. 530 (1918); *Ash Sheep Co.* v. *United States*, 252 U.S. 159 (1920); *United States* v. *Candelaria*, 271 U.S. 432

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[10] Unlike some later opening legislation, the 1889 Act involved in *Minnesota* did not contain a special "school provision," stipulating outright purchase by the United States of Sections 16 and 36 and conveyance to the State. See n 14, *infra*

(1926); *United States* v. *Ramsey*, 271 U.S. 467 (1926); *United States* v. *Chavez*, 290 U.S. 357 (1933); *United States* v. *McGowan*, 302 U.S. 535 (1938).

These early precedents make clear that the Court was adhering to a consistent approach when, more recently, it expressly affirmed the principle that allotment and opening up of tribal lands does not presumptively end the Reservation or reduce its boundaries. *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *Mattz* v. *Arnett*, *supra*; *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. at 478-479. That remains the rule today, as the Court summed it up in *DeCoteau*, 420 U.S. at 444:

> This Court does not lightly conclude that an Indian reservation has been terminated. "[W]hen Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *United States* v. *Celestine*, 215 U.S. 278, 285. The congressional intent must be clear, to overcome "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 174, quoting *Carpenter* v. *Shaw*, 280 U.S. 363, 367. Accordingly, the Court requires that the "congressional determination to terminate * * * be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz* v. *Arnett*, 412 U.S., at

> 505. See also *Seymour* v. *Superintendent*, 368 U.S. 351, and *United States* v. *Nice*, 241 U.S. 591. In particular, we have stressed that reservation status may survive the mere opening of a reservation to settlement, even when the moneys paid for the land by the settlers are placed in trust by the Government. *Mattz* v. *Arnett*, *supra*, and *Seymour* v. *Superintendent*, supra.

See, also, *Rosebud*, 430 U.S. at 586-587 ("The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status."); cf. *United States* v. *John*, 437 U.S. 634 (1978).

To be sure, as *DeCoteau* and *Rosebud* illustrate, there are instances in which a Reservation must be found to have been irrevocably terminated or diminished. See pp. 14-17, *infra*. But the teaching of this Court over three-quarters of a century remains that such a finding requires very clear evidence of congressional intent to effect a present – and not merely an eventual – dissolution or dismemberment of the Reservation. In assessing that intent, we must of course be attentive to the contemporary understanding. But, again, it is essential to distinguish future expectations from immediate consequences.[11]

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[11] In this context, it is important to remember that the only parties to any cession were the Tribe and the United States. Future settlers, albeit intended beneficiaries, can claim only what the Congress secured, not some larger immunity they may

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2. How then do we distinguish betwen action effectively ending the Reservation status of the whole or a part of recognized Indian lands and a mere opening up of such lands? As we have said, legislation enacted between 1890 and 1910 was written, often carelessly, in the expectation that the entire Reservation system would be dismantled within a relatively short span. And it is equally clear that "Reservation status" for alienated lands was not yet a familiar concept.[17] Accordingly, we should not be surprised, in

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have supposed would attach to their acquisition of surplus Indian land At all events, the "legitimate expectations" of white settlers can be accommodated without destroying the Reservation status of opened areas See *Montana* v *United States*, 450 U S at 559-561 & n 9 But, whatever the equities may be in favor of individual holders of "fee" parcels who are challenging Reesrvation ordinances, no comparable claim can be asserted by the state and its counties They plainly were not parties, directly or indirectly, to any agreement or legislation touching the status of the Reservation The interest the states and counties now assert - seldom clearly articulated - cannot help us in determining the original understanding.

[17] At the time, the usual focus was as to whether former tribal lands remained "Indian country" for purposes of exercising federal criminal jurisdiction and prosecuting violations of federal liquor law that were restricted to "Indian country" The prevailing view was that fully alienated tracts, including unrestricted allotments of tribal members, ceased to be "Indian country" *E.g.*, *Bates* v *Clark*, 95 U S 204 (1877), *Dick* v. *United States*, 208 U S 340 (1908), *Clairmont* v *United States*, 225 U.S. 551 (1912) It was only in 1932 (Act of June 28, 1932, ch 284, 47 Stat. 336 *et seq*) that ceded rights-of-way across Reservations were included, and in 1948 (see 18 U S C 1151(a)) that all lands within a Reservation, including those patented in fee, were declared "Indian country." The question of *tribal* jurisdiction

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most cases, to find no express legislative discussion of Reservation status or Reservation boundaries as affected by opening up of tribal lands for sale to settlers. In the climate of the times, the only meaningful question is whether the legislation meant to accomplish a *present, unequivocal* and *irrevocable* transfer of Reservation lands from the Tribe to the United States.

a. In the treaty days, before 1871, such cessions were, of course, quite frequent. Even though part or even the whole of the "price" was often to be paid in installments (whether in money or in kind, or both) over several years, the typical treaty cession leaves no doubt that the transfer was complete upon ratification. *E.g., United States* v. *Omaha Tribe of Indians*, 253 U.S. 275 (1920).[13] Like "cessions," expressly so

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over non-Indians on alienated parcels within the Reservation was not then a live issue, except in the case of the Civilized Tribes of the Indian Territory. There, however, tribal taxing authority over activities in alienated town sites was sustained *Buster* v *Wright*, 135 F 947 (8th Cir 1905), appeal dismissed, 203 U S. 599 (1906) See, also, *Morris* v *Hitchcock*, 194 U.S 384, 392 (1904), citing with approval an Attorney General's opinion upholding tribal taxation of hay exports from the Reservation even if the non-Indian taxpayer were "the absolute owner of the land on which the hay was raised " This history is recounted in *Merrion* v *Jicarilla Apache Tribe*, 455 U.S 130, 139144 (1982).

[13] Even then, there were exceptions Some treaties provided for payment of "ceded" lands, at least in part, by turning over to the Tribe the proceeds of sale received from settlers. In such cases, the Court characterized the cession as incomplete until the tracts were sold, holding that the Indians remained the

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termed, were subsequently accomplished by formal "agreement," incorporated in Acts of Congress. That was the form of the transaction by which the Black Hills were severed from the Great Sioux Reservation in 1877, and much other land in 1889. See Act of Feb. 28, 1877, ch. 72, 19 Stat. 254 *et seq.*; Act of Mar. 2, 1889, ch. 405, 25 Stat. 888 *et seq.* Similar cession agreements effected the disestablishment of the North Half of the Colville Reservation and the termination of the Lake Traverse Reservation. See *Seymour*, 368 U.S. at 355; *DeCoteau*, 420 U.S. at 455; *id.* at 455-460 (App. A to opinion). And there are many other instances. See, *e.g.*, *Mattz*, 412 U.S. at 504 n.22; *DeCoteau*, 420 U.S. at 439-440 n.22. See, also, the Act of June 6, 1900, ch. 813, 31 Stat. 672 *et seq.*, upheld in *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903).

Sometimes, to be sure, the purported "agreement" had not been approved by the requisite number of tribal members stipulated in an earlier treaty, or consent had been induced by questionable methods. *E.g.*, the case of the Black Hills, discussed in *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 381-382 & n.13 (1980). But, in light of *Lone Wolf*, that is irrelevant to our inquiry. The critical fact in all these cases is that Congress exacted a *present and total surrender of all tribal interest* in the ceded land in return for an *unconditional commitment* by the

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equitable owners and that the ceded area should not be deemed "public lands." *E.g.*, *United States* v. *Brindle*, *supra*

United States to an agreed payment, even if inadequate or delayed. Although, usually, the Government immediately opened the area to settlers, the Indians, having irrevocably and completely divested themselves of title for a fixed price, had no interest in those subsequent events.

b. On the other hand, during the decade preceding and especially that following 1900, there were more numerous arrangements under which the United States, with or without the formal concurrence of the Tribe, opened up tribal lands to sale without any firm obligation to do more than credit or pay over the proceeds to the Tribe when realized.[14] In

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[14] There was, commonly, a special exception for "school sections" within the opened area, which were purchased outright by the United States and conveyed to the state. See, *e g*, Act of Apr 27, 1904, ch 1624, 33 Stat 352 *et seq*, quoted in the following note But, as *Ash Sheep* makes clear, such a provision has no effect on the continuing Indian status of the remaining lands opened up. See pp 17-19, *infra* The Court reiterated this view as recently as *DeCoteau*, 420 U S at 445-446 n.33 a "school provision" of this kind "implies nothing about the presence or absence of state civil or criminal jurisdiction over the remainder of the ceded lands." A sufficient example is the Crow Allotment Act of June 4, 1920, ch. 224, § 16, 41 Stat 756, which provided for the purchase by the United States and grant to the State of Montana of Sections 16 and 36 within the Crow Reservation No one has ever contended that this legislation affected the status or boundaries of the Reservation See *Montana* v. *United States*, 450 U.S at 548 Since Montana was admitted by the same Enabling Act as South Dakota, we must assume the Court was misled in *Rosebud* in suggesting that implementation of an Enabling Act school section grant within Indian country implies disestablishment of the affected portion

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effect, the Government was a mere sales agent. No doubt, the primary motive for resorting to this type of scheme was to avoid committing the United States to any independent financial obligation.[15]

And it was presumably anticipated that, in due time, all tracts would be sold and that the upshot would be the same as in the case of a straightforward cession. But, until that day, the transfer was incomplete.

Unsurprisingly, the clear line between outright cession and mere opening up of tribal lands was not always observed. As *Rosebud* illustrates, Congress

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of the Reservation. See 430 U S at 599-601 In our view, *DeCoteau* correctly concluded that a school section provision is wholly neutral on the issue of disestablishment.

[15] An express statement of this concern is reflected in Section 8 of the Crow Agreement, incorporated in the Act of Apr 27, 1904, ch 1624, 33 Stat. 361, quoted in *Ash Sheep*, 252 U S at 165-166

> That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend any pay over the proceeds received from the sale thereof only as received, as herein provided.

This was a standard provision in opening up legislation, including the 1908 Act now before the Court See Pet. Br. App A14-A15

sometimes combined features of both schemes in a given case. Thus, the 1904 Act affecting a portion of the Rosebud Sioux Reservation grew out of a straightforward cession agreement with the Tribe, but the payment provisions were transmuted by the Congress so as to resemble a typical opening up arrangement. See 430 U.S. at 590-598. In part because the immediate cession language was retained in the first statute (*id.* at 591, 596-597) and because the later Acts of 1907 and 1910 were seen as derivative legislation, carrying forward the same "baseline" objective (430 U.S. at 605-615), the Court concluded that an intent immediately to diminish the Reservation must be found. But we do not read *Rosebud* as erasing the traditional distinction.[16] The rule of *Seymour* and

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[16] Notwithstanding what was written in *Rosebud,* 430 U.S at 613-614 & n 47, we fail to appreciate the significance for Reservation status of a prevision prohibiting the introduction of liquor into an "opened" area for twenty-five years – at least when, as there and here, it encompasses "land allotted, those retained or reserved," as well as "surplus land sold, set aside for town-site purposes, granted to the State * * * or otherwise disposed of." See Act of May 30, 1910, ch 260, § 10, 36 Stat. 451 (Rosebud Act); Act of Feb 17, 1910, ch. 40, 36 Stat 196 *et seq* , amending Section 8 of the 1908 Act before the Court (Pet Br. App. A18-A20) Under the Act of July 23, 1892, ch. 234, 27 Stat. 260 *et seq* , as amended by the Act of Jan 30, 1897, ch. 109, 29 Stat. 506 *et seq* , the prohibition already applied to all restricted allotments whether or not within a Reservation, but, at least by clear implication, did not cover unrestricted allotments or alienated parcels even inside a Reservation See *United States* v. *Sutton,* 215 U S at 293. See also, n 12, *supra* Indeed, that is the general rule today with respect to "non-Indian communities" within Reservations 18 U S C 1154(c), see *United States* v.

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Mattz has not been repudiated and presumably continues to govern in any like situation.

3. The immediate consequences of opening up legislation not involving an unconditional present cession are clear enough. Putting aside allotments selected in the opened area and any school sections purchased outright for the state, the Tribe retained its beneficial title to the land until sold, as well as the right to any profits derived from their use. Only Indian occupancy rights were suspended – so that the land could be offered, more invitingly, with "vacant possession." In sum, as this Court repeatedly held in a series of cases including *Brindle, Mille Lac Band of Chippewas, Minnesota* v. *Hitchcock* and *Ash Sheep,* while unsold, such opened lands remained Indian for most purposes. The last decision states the situation aptly (252 U.S. at 165-166):

Mazurie, 419 U.S 544 (1975) It follows that the provisions in the 1910 statutes quoted above were redundant with respect to allotments (until the restrictions were removed), but important as they affected alienated lands, even if the Reservation boundaries remained unchanged.

Again, the point is illustrated by the Crow Allotment Act of 1920, which, in Section 9 (41 Stat. 754), extended the liquor prohibition to fee tracts within the Reservation (including unrestricted allotments held by Indians, lands alienated to others, and state school sections) – an action which no one has suggested disestablished or changed the boundaries of the Crow Reservation So, also, a like statute covering the Colville Reservation did not affect the result in *Seymour* See Act of Aug 31, 1916, ch 424, 39 Stat. 672 *et seq.*, noticed by the Court, 368 U S at 356 n.12.

It is obvious that the relation thus established by the act between the Government and the tribe of Indians was essentially that of trustee and beneficiary and that the agreement contained many features appropriate to a trust agreement to sell lands and devote the proceeds to the interests of the *cestui que trust. Minnesota* v. *Hitchcock,* 185 U.S. 373, 394, 398 * * *.

Taking all of the provisions of the agreement together we cannot doubt that while the Indians by the agreement released their possessory right to the Government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee, and that they did not become "Public lands" in the sense of being subject to sale, or other disposition, under the general land laws. *Union Pacific R.R. Co.* v. *Harris,* 215 U.S. 386, 388. They were subject to sale by the Government, to be sure, but in the manner and for the purposes provided for in the special agreement with the Indians, which was embodied in the Act of April 27, 1904, 33 Stat. 352, and as to this point the case is ruled by the *Hitchcock* and *Chippewa Cases, supra.* Thus, we conclude,

that the lands described in the bill were "Indian lands" * * * [17]

It is plain that the continuing tribal interest in the lands opened under these arrangements was not merely a right of reversion in the event the lands were never sold and the Government continued to decline to purchase them itself. There was not a completed sale, subject only to a condition subsequent. Nor was the Government "taking" the land without payment, exposing itself to an obligation, in

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[17] Usually, the lands "opened" under this type of legislation were not simply made available to all comers under the provisions of the general public land laws; rather, their disposition was governed by special conditions, typically involving classification and appraisal, installment payments, and, if no purchasers appeared after seven years, sale at public auction A common provision expressly stipulated that "no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in [the President's] proclamation" *E g*, Sections 2-5 of the 1908 Act (35 Stat 461-463) involved here, Pet Br App A4-A12 And, of course, the proceeds of sale did not go to the Treasury as unrestricted moneys, but were required to be credited to the Tribe, with interest *E g*, Section 6 of the same Act (35 Stat 463), Pet. Br. App. A12 Obviously, this was a far cry from simply "restoring" the area unconditionally to the "public domain."

We note that the statutes involved in *Ash Sheep* and *Minnesota* v *Hitchcock* incorporated agreements with the Tribe which purported to "cede" the lands that were to be opened to sale But the Court looked to the substance of the transaction, not the terminology, and concluded that the "cession" was conditional, in effect suspended until and unless sales to settlers were realized *A fortiori*, that must be the result where no agreement and no words of cession are present.

due course, to make "just compensation" out of Treasury funds if settlers failed to provide the price. Compare *United States* v. *Sioux Nation of Indians, supra.* Indeed, the Congress expressly excluded that possibility. See n.15, *supra.* The transfer was, rather, an incomplete transaction, held in abeyance until payment should be received from homesteaders. For the time being, the Indians' possessory rights were suspended, but that is all. And, at some point, if the scheme failed for lack of purchasers, the Tribe's right to resume occupancy presumably must be conceded – even without the benefit of "restoration orders" under the Indian Reorganization Act of 1934.[18] In the interim,

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[18] Section 3 of the IRA, 25 U.S.C. 463, authorized the Secretary of the Interior "to restore to tribal ownership the remaining surplus lands of any Indian reservation [heretofore] opened." Since legal title was to remain with the United States and the Tribe had never lost beneficial title, the practical effect of restoration orders under this provision was to return *use and occupancy rights* to the Tribe. As the Senate Report accurately recited, Section 3 of the IRA was intended to restore unsold "surplus" tracts "to tribal use." S. Rep. 1080, 73d Cong., 2d Sess. 2 (1934). Stated differently, restoration orders ended the suspended status of such areas. As we have said, that result must have occurred sooner or later if the surplus lands remained unsold for a very extended period. But the IRA and the restoration orders issued under it serve the useful function of mooting the question whether, in a given case, lapse of time had already effectively ended the "opening" of tribal lands. Plainly, such restoration orders are not evidence that the Reservation status of the affected lands had been irretrievably lost. *See Rosebud,* 430 U.S. at 604 n. 27.

the Indians' title had survived and there was no basis for altering the Reservation boundaries.[19]

The early cases, it is true, dealt only with *unsold* "surplus" lands. But, given that these retained their Reservation status – even if partially suspended – it would be incongruous to conclude that new boundaries should be drawn, in a crazy-quilt pattern, to exclude alienated parcels after Congress determined that they, also, should be deemed "Indian country." 18 U.S.C. (Supp. V) 1151 (a). At all events, that is what this Court squarely decided in *Seymour* and reaffirmed in *Martz*.

4. There is a final caveat. In cases where the opened area of a Reservation was entirely – or almost entirely – sold off to non-Indian settlers before the process was halted by the change of policy enacted in 1934, it may well be right to treat the Reservation as diminished today. This is not merely a bow to current reality. Nor is it an impermissible attempt to construe turn of the century legislation in accordance with unpredictable future events. On the contrary, we reasonably may suppose that the sponsors of "opening

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[19] It is worth noting that Interior Department Regulations promulgated in 1912 "contemplated that remaining surplus lands, the proceeds of the disposal of which were for the benefit of the Indians, would be cooperatively administered by the Indian Office and the General Land Office, the Indian Office retaining jurisdiction of the use of the lands before they were sold and the General Land Office administering the final disposition of the lands." See 56 Interior Dec. 330, 339 (1938).

up" legislation would have intended to end the Reservation status of the affected area *if and when* their expectations were fully realized, but not otherwise.[20] Then, as now, it must have seemed artificial to continue to treat as part of an Indian Reservation a discrete area, typically of large dimensions, once both land ownership and population had ceased to be Indian. Per contra, where no present cession was involved and disappointingly few settlers had taken up Congress's invitation, there was, and is, no justification for jurisdictionally separating from the Reservation "core" an adjacent tract that remains significantly Indian in every respect.

All else aside, this explains the result in *Rosebud*. As the Court there stressed, of the more than 2 million acres opened up by the Acts of 1904, 1907 and 1910, only some 4,600 remained unsold in 1938. 430 U.S. at 588 n.3. And, today, more than 90% of the opened area is non-Indian, both in population and land use. Id. at 605. In these circumstances, it was obviously difficult to conclude that Congress would have wished the affected area to retain Reservation

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[20] Where allotments, normally restricted for 25 years, were provided for in the opened area, it would be reasonable to suppose that the "Indian" character, or "Reservation status," of that area was intended to lapse at the end of the 25-year period – which also coincided in some cases with the time when the liquor prohibition would cease – assuming that, by then, the surplus lands also had been fully disposed of. See *Mattz*, 412 U.S. at 496.

status. At some point, the tail can no longer wag the dog.[21]

So saying, we imply no "majority rule" under which the status of opened tribal lands depends upon whether more or less than half the acres, or the population, remain Indian. One of the familiar consequences of the allotment policy is that, as a result of numerous exceptions to the restrictions on alienation, much of the acreage of even the unopened portion of some Reservations is today in non-Indian hands. *E.g.*, *Montana* v. *United States*, 450 U.S. at 548 (Crow Reservation); *United States* v. *Mitchell*, No. 81-1748 (June 27, 1983), slip op. 3. So, also, the concentration of a large non-Indian population in a few alienated town sites within a Reservation sometimes left the Indians grossly outnumbered. *E.g.*, *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 470 (1979). Since these disparities do not affect the status of the Crow Reservation, the Quinault Reservation, or the Yakima Reservation, there is no cause to treat like patterns of land ownership or population as

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[21] This likewise explains the ultimate redrawing of Reservation boundaries to exclude the opened area of the Red Lake Reservation considered in *Minnesota* v. *Hitchcock*, and the area of the Crow Reservation affected by the 1904 Act involved in *Ash Sheep*. In both cases, almost all the unallotted land in the opened portion of the Reservation was sold before 1934. See *United States* v. *Holt State Bank*, 270 U.S. 49, 52-53 (1926). In the case of the Crow Reservation, only some 10,000 acres (out of a total of more than 1 million acres) in the area opened by the 1904 Act remained unsold, as attested by the "restoration" Act of May 19, 1958, Pub. L. No. 85-420, 72 Stat. 121.

inconsistent with Reservation status for once opened areas. It is only when the Indain character of former tribal lands is wholly destroyed that it seems justifiable to sever the area from the Reservation.

B. The 1908 Act

Applying the principles just outlined to the case before the Court yields a clear conclusion against diminishment of the Cheyenne River Reservation. The points are quickly stated.

1. First and foremost, the 1908 Act involved here is typical opening up legislation, of a piece with the statutes considered in *Seymour* and *Mattz*. There was no present cession for an agreed price, but, instead, an arrangement whereby the Government – expressly avoiding any obligation to buy itself – undertook to sell tribal lands to settlers for the account of the Tribe. No language of cession is to be found, nor any other terms "precisely suited" to disestablishment. Indeed, there was no prior agreement with the Tribe.

The basic character of the congressional action is perfectly clear. It cannot be changed into an immediately effective cession merely because the drafters carelessly spoke of the unopened portion of the Reservation as "diminished" in one place (§ 2 (35 Stat. 461); Pet. Br. 19-20), and, in another (§ 9 (35 Stat. 464); Pet. Br. App. A16), to the opened area as "part of the public domain." These were, of course, half-truths. Except for any allotments selected in the

territory opened to settlers, the area of Indian occupancy *was* diminished temporarily; and, ultimately, if all went as expected, the Reservation would be permanently reduced in size. Similarly, although the opened area could not accurately be assimilated to the "public domain" because it remained encumbered by tribal equitable ownership and was only made available to settlers on special conditions,[22] those lands were, for the time being, given some of the attributes of "public lands."[23]

At all events, such convenient short-hand references to the two portions of the Reservation cannot overcome the detailed provisions of the statute. Cf. *Mattz*, 412 U.S. at 498. Knowing the true nature of the arrangement, we cannot be misled by a wrong label. In all essential respects, the 1908 Act is indistinguishable from the statutes examined in *Seymour* and *Mattz* and the consequences should be the same.[24]

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[22] See n 17, *supra*

[23] The "surplus lands" were, after all, opened to entry under some of the "public land laws," albeit with significant qualifications Perhaps the most useful short-hand description of unsold "surplus" lands opened to sale is that given by the Interior Department Solicitor in 1938 (56 Interior Dec. at 338) "qualified public lands and also qualified Indian lands "

[24] The Act of Mar 22, 1906, ch 1126, 34 Stat 80 *et seq*, considered in *Seymour*, is identical to the present statute except that (1) it does not contain a "school section" provision or one prohibiting the introduction of intoxicants, and (2) it provided for sale, rather than reservation of minerals on the opened tracts As we have already noted, the first difference is irrelevant to

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2. Resort to legislative history gives no different answer. To be sure, the Indians were briefly consulted as to their willingness to part with the area to be opened. Since it was anticipated that purchasers would be found for all the lands, the Government representative quite understandably did not advert to the legal status of the area in the event that expectation was disappointed. And it is equally unsurprising that tribal spokesmen did not discuss that eventuality. Interestingly, one tribal leader preferred to have the Government "buy [the surplus lands] outright," fearing that "it [would] take years for all of the land to be disposed of." Pet. Br. App. A153. He was firmly told that a "lump sum" payment was impossible because "Congress will not accept anything of that kind." Pet. Br. App. A158. Nevertheless, the Indians presumably believed that white men wanted the land and would buy it sooner or later, and that, except for allotments, the entire area would be taken. Given that premise, there is nothing in the minutes of the truncated Indian meetings held by Inspector McLaughlin or in his report that casts useful light on

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our inquiry. The second, on the other hand, cuts in favor of continued Reservation status here.

The Act of June 17, 1892, ch. 120, 27 Stat. 52 *et seq*., considered in *Mattz*, is much more abbreviated. If anything, it is more susceptible to being construed as a "termination" statute because the opened lands are made available under the land and mineral laws *without condition*. This was more arguably a "restoration to the public domain" than can be found in the 1908 Act now before the Court.

our question. What is relevant, however, is that, at the end of the day, no cession resulted. The Tribe, told it had no real option in light of *Lone Wolf*, mostly listened and never fully acquiesced in the opening arrangment. See, *e.g.*, Pet. Br. App. A124-A125, A127-A129, A141, A145-A146, A152, A161.[25]

Nor do the congressional debates and reports offer more. Again, although the Congress was careful not to commit itself to any payment from the Treasury (except for school sections), the prevailing optimism foreclosed any discussion of the consequences if homesteaders did not come forward in sufficient numbers. In these circumstances, no significance can be attached to a reference to the Reservation in one Committee Report as "diminished" (Pet. Br. App. A28). Indeed, another Report speaks of surplus lands "on the Cheyenne River and Standing Rock Indian reservations" (Pet. Br. App. A21, A36).

Finally, an amending statute of 1910 is invoked (Pet. Br. App. A17-A20). Reinstating the figure recommended two years earlier, that legislation increased (from $1.50 to $2.50 per acre) the price to be paid for the school sections, and, accordingly, made a

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[25] In fact, one of the few tribal leaders present asked for more time to consider the matter in full Council and was cavalierly told to communicate the Tribe's views to the Agency Superintendent, who must forward them to reach Washington within two weeks. See Pet. Br. App. A50, A161. Unsurprisingly, no such communication was received before Inspector McLaughlin submitted his report. Pet. Br. App. A50-A51.

larger appropriation for that purpose. See S.D. Counties' Br. App. C1-051. Beyond this, the 1910 Act subjected the entire original Reservation to existing laws prohibiting the introduction of intoxicants into Indian country (Pet. Br. App. A19-A20). For the reasons already given (n.16, *supra*), we cannot construe this action as bearing on the issue of diminshment or disestablishment. At all events, this later statute, enacted *at the request of the Tribe*, can hardly affect what is claimed to have been a present cession two years earlier. See S. Rep. 518, 61st Cong., 2d Sess. 3, 5 (1910).

3. The subsequent history, as in most like cases, is confused and rife with inconsistencies. See *Seymour*, 368 U.S. at 356 n.12; *Mattz*, 412 U.S. at 484-485; *DeCoteau*, 420 U.S. at 442-444; *Rosebud*, 30 U.S. at 603-605. For the most part, it is no more reliable here than elsewhere in deciding the diminishment issue. Nevertheless, we may notice two points.

From the first, there were references to the opened area as a continuing part of the Reservation, both in Acts of Congress,[26] congressional reports and

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[26] *E g* , the Act of June 23, 1910, ch 369, 36 Stat. 602, authorizing the sale to a railroad of a tract in the opened area described as "in the Cheyenne River Reservation"; and Section 2 of the Act of Mar. 4, 1921, ch 174, 41 Stat. 1447, permitting extension of time for payment of installments due by purchasers of land "in the Cheyenne River Reservation "

debates,[27] and executive documents.[28] So, also, the approved tribal constitution of 1935 gave the Tribe jurisdiction over the whole undiminished Reservation. See Pet. Br. 60.

Nor is the early jurisdictional history as one-sided as petitioners suggest. To be sure, in *United States* v. *La Plant*, 200 F. 92 (D.S.D. 1911), a district court, on questionable reasoning, declined jurisdiction of a homicide by one non-Indian against another in the opened area,[29] and the State occasionally filled the void. But prosecutions by either sovereign, then as now, were rare, and, in fact, many civil and

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[27] *E g*, H R Rep 1046, 61st Cong , 2d Sess. (1910); S Rep 723, 61st Cong , 2d Sess (1910); H R Rep 315, 62d Cong , 2d Sess (1912), S Reps 209 and 216, 62d Cong , 2d Sess (1912); 45 Cong Rec 5799-5810 (1910)

[28] References to the opened lands as "in" or "within" the Reservation occur in the President's opening Proclamation (38 Interior Dec 157 (1909)), an Indian Department Order relating to selection of school sections (38 Interior Dec. 455 (1910)), and others extending the time for payment by purchasers (48 Interior Dec 80 (1921); 49 Interior Dec 131 (1922))

[29] At the time, a special statute (Act of Feb. 2, 1903, ch. 351, 32 Stat 793) provided – contrary to *United States* v. *McBratney*, 104 U S 621 (1882) – that, regardless of the race of the offender and the victim, certain enumerated crimes were within federal jurisdiction if committed on any "Indian Reservation" in South Dakota Accordingly, the court in *La Plant should* have focused on whether the opened area of the Cheyenne River Reservation had been disestablished. In fact, however, the court based its ruling on a finding – erroneous in light of *Ash Sheep* – that Indian title had been extinguished by the 1908 Act as to unsold tracts See 200 F. at 94-95

criminal matters continued to be handled by tribal and federal authorities within the opened lands. See *Hoxie Report* 100-108, 108-118.[30] In other respects, the United States remained the civilian administrator of the entire original Reservation, including the unsold lands. *Hoxie Report* 71-81, 87-93.

4. In our view, these facts are of secondary relevance. What is dispositive here, it seems to us, is that the opening up experiment in large measure failed, so that today the disputed area retains an important Indian character. As we have said, even though no immediate disestablishment was accomplished by enactment of the 1908 Act, that result might well have later occurred if settlers had, as expected, acquired all, or almost all, the opened lands – as was the case in *Rosebud*. But no such implied diminishment can be found when, as here, the Tribe's title to most of the opened land survived and has been formally "restored" by Interior Department orders.[31]

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[30] F Hoxie, *Jurisdiction on the Cheyenne River Indian Reservation An Analysis of the Causes and Consequences of the Act of May 29, 1908* (undated manuscript) [hereinafter cited as *Hoxie Report*] This report was part of the record in *United States* v *Dupris, supra,* and was incorporated as part of the record in the instant case, now transmitted to this Court

[31] The area opened by the 1908 Act comprises approximately 1 6 million acres By the time of the opening Proclamation of August 19, 1909, almost 400,000 acres in that area had been allotted to tribal members, and some 133,000 acres were subsequently allotted there *Hoxie Report* 38, 88 After deducting some 90,000 acres for state school sections, this left about 1 million

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Indeed, unless the question was irrevocably settled in 1908, it is difficult to attribute to anyone – including the Congress of 1908 – an intent to treat as no longer part of the Reservation an area which includes the tribal capital, the Indian Agency and the major Indian town, within which some two-thirds of tribal members reside (outnumbering non-Indians there), and where almost half the areage is Indian owned. Common sense rebels against that result.

What is more, compelling such a complex pattern, in a case like this one, defeats more recent congressional policy and unnecessarily creates jurisdictional problems. In 1934, implementing the Indian Reorganization Act, the Secretary of the Interior

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acres open to homesteaders. But it appears that relatively few entries were perfected, in large part because the extravagant promise of the "boosters," having got the settlers in, could not keep them there See *Hoxie Report* 66-67. The restoration orders, affecting unsold tracts in the opened portion of the Reservation, cover all but one of the 78 townships that are embraced in whole or in part within the opened area See 6 Fed. Reg 3300 (1941), 14 Fed Reg 471 (1949), 17 Fed Reg 1065 (1951), 22 Fed Reg. 3693 (1957); 30 Fed Reg. 15588 (1965), 32 Fed Reg 14276 (1967) Although the actual acreage of the unsold lands affected by the major "restorations" of 1941 and 1951 (6 Fed Reg 3300 and 17 Fed Reg. 1065) is not given, the detailed exclusion of tracts as small as a sixteenth of a section and individual townsite lots suggests that most of the remaining unallotted land was unsold But, as on many other Reservations, a large number of allotments fell into non-Indian hands and this accounts for a substantial part of the "fee" holdings now existing in the former opened area Nevertheless, today, almost half the opened area remains in Indian ownership, all of it, with minor exceptions, in trust or restricted status.

halted all further sales of "opened lands," including those on the Cheyenne River Reservation. See 54 Interior Dec. 559, 561, 563-564 (1934).[32]

Most of the, unsold area was "restored" to the Tribe in 1941 (6 Fed. Reg. 3300) and 1951 (17 Fed. Reg. 1065), smaller tracts in other years (14 Fed. Reg. 471 (1949); 22 Fed. Reg. 3693 (1957); 30 Fed. Reg. 15588 (1965); 32 Fed. Reg. 14276 (1957)). As the South Dakota Counties (Br. 46-47 & n.16) are at pains to point out, these orders expressly declared the restored acreage "part of the existing reservation."[33]

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[32] On September 19, 1934, the Secretary of the Interior approved the recommendation of the Commissioner of Indian Affairs, joined by the Commissioner of the General Land Office, that all unsold lands within the opened areas of Indian Reservations be temporarily withdrawn from sale with a view to "restoration" under Section 3 of the IRA – specifically including lands covered by the 1908 Act involved here 54 Interior Dec at 561-562, 563. This order was later amended to cover three further opened Reservations and to embrace unsold lots in townsites *Id.* at 563-564. It is to be noted that, at the time, the Department's view was that restoration orders under Section 3 could only reach lands "usually referred to as surplus lands of Indian reservations" *Id* at 560 Four years later, to be sure, it was held that lands "cut off" from Reservations, but as to which Indian beneficial title had not been extinguished, were equally subject to restoration under Section 3 56 Interior Dec. 330, 333 (1938) But that does not impugn the opinion given in 1934 that the Cheyenne River Reservation was not diminished by the 1908 Act. At all events, it is clear that, at all times, the Department viewed "restored" lands as enjoying "Reservation status" thereafter See 56 Interior Dec at 333

[33] Petitioners and those who support them argue that, because restoration orders invoked both Section 3 and Section 7

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Thus, it is common ground that much of the disputed area is today not merely "Indian country," but an integral portion of the Cheyenne River Reservation. In light of the congressional decision in 1948 to give like status to allotted and alienated tracts within a Reservation, it is hardly consistent to draw Reservation boundaries in the opened area in "checkerboard" fashion so as to include only restored lands.

In our submission, every consideration argues for the obvious alternative: the Cheyenne River Reservation was not immediately diminished in 1908, and, notwithstanding the expectations of all concerned, the opened area survived as part of the Reservation. That solution is both practical and faithful to the intent of Congress. And it follows the Court's rule that only the clearest directive will destroy the protective shield of Indian Reservation status.

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of the IRA (25 U.S.C. 463, 467), they should be construed as "adding" to the Reservation lands which had previously lost that status. But there is no stronger reason to take that view here than in respect of a similarly worded "restoration," by Act of Congress, in the case of the Colville Reservation. See *Seymour*, 368 U.S. at 356. As previously noted (n.18, *supra*), such orders are ambiguous on the interim status of surplus lands. But no one disputes the validity or effectiveness of those restoration orders as confirming or granting Reservation status to the "restored" lands for the future. See n.32, *supra*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Acting Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

DAVID C. SHILTON
JANET L. STECKEL
Attorneys

OCTOBER 1983

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

No. 92-6281

ROBERT HAGEN, PETITIONER

v.

STATE OF UTAH

On Writ of Certiorari to the Supreme Court of Utah

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case involves the boundaries of the Uintah Indian Reservation. The location of the boundaries affects the scope of the law enforcement obligations and powers of the United States under the Indian Major Crimes Act, 18 U.S.C. 1153, and other federal statutes that apply only in Indian country. Moreover, because of the United States' special relationship with the Indian Tribes, we have a strong interest in the development of sound principles for determining when a reservation has been diminished or extinguished.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Act of May 27, 1902, ch. 888, 32 Stat. 245, and the Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, are reprinted in an appendix to this brief.

STATEMENT

1. On October 3, 1861, President Lincoln established an Indian Reservation along a river in the Territory of Utah then known as the Uinta, but now referred to as the Duchesne.[1] Executive Order No. 38-1, *reprinted in* 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 900 (1904). Congress confirmed the President's action in 1864, providing that the land in question was "set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of [the Utah] territory as may be induced to inhabit the same." Act of May 5, 1864, ch. 77, § 2, 13 Stat. 63.

Before the end of the nineteenth century, however, the Uintah Indian Reservation – like many others – became the subject of the "familiar forces" brought to bear by "the desire of non-Indians to settle upon reservation lands." *DeCoteau* v. *District County Court,* 420 U.S. 425, 431-432 (1975). Those forces led

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[1] Another river now referred to as the Uinta is a tributary of the Duchesne that flows near the eastern boundary of the original Reservation before entering the Duchesne near the southeastern corner of the original Reservation.

to the passage in 1887 of the General Allotment Act, which granted the President authority "to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers, with the proceeds of these sales being dedicated to the Indians' benefit." *DeCoteau*, 420 U.S. at 432 (citing Act of Feb. 8, 1887, ch. 119, 24 Stat. 388).

The first significant step in the move toward allotment of the Uintah Indian Reservation came in 1894, when Congress directed the President to appoint a commission to negotiate with the Indians on the Reservation for the acceptable of allotments and "the relinquishment to the United States of the interest of said Indians in all [unallotted lands]." Act of Aug. 15, 1894, ch. 290, § 22, 28 Stat. 337.[2] Because the matter was not resolved promptly,[3] Congress in 1898 again directed the Secretary to appoint a commission to negotiate an agreement for allotment of Uintah Indian Reservation lands and "cession to the United States" of unallotted lands. Act of June 4, 1898, ch. 376, §§ 1-2, 30 Stat. 429. When the Indians

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[2] In 1888, Congress had restored to the public domain a 7,040-acre triangle on the eastern edge of the Uintah Reservation, commonly, referred to as the "Gilsonite Strip," because of the deposits of gilsonite found on that tract. Act of May 24, 1888, ch. 310, 25 Stat. 157-158. The status of the Gilsonite Strip is not at issue in this case.

[3] Negotiations with the Uintah Reservation Indians were delayed because of difficulties encountered in negotiating with the Indians on the neighboring Uncompahgre Reservation. See S. Doc. No. 32, 55th Cong., 1st Sess. 2-3 (1897).

resisted, Senator Rawlins of Utah introduced a series of bills that would have opened the Reservation unilaterally. S. 4867, 55th Cong., 3d Sess. (1898); S. 93, 56th Cong., 1st Sess. (1899); S. 145, 57th Cong., 1st Sess. (1902) (*reproduced in* S. Doc. No. 212, 57th Cong., 1st Sess. 3-4 (1902)); see S. Doc. No. 212, *supra*, at 4-6 (discussing resistance of Indians). Those bills, however, were not enacted.

Instead, in 1902, Congress passed an Act providing that if a majority of the adult male members of the Uintah and White River Indians consented, the Secretary of the Interior should make allotments by October 1, 1903, out of the Uintah Indian Reservation.[4] The allotments were to be in the amount of 80 acres to each head of a family and 40 acres to each other member of the Tribes. Act of May 27, 1902, ch. 888, § 1, 32 Stat. 263-264 (1902 Act). The 1902 Act also provided that when the October 1, 1903, deadline for allotments passed, "all the unallotted lands within said reservation shall be restored to the public domain," and that those lands would be subject to entry under the homestead laws, at a rate of $1.25 per acre. 32 Stat. 263. Finally, the 1902 Act provided that the net proceeds of the sale of lands restored to the public domain, "under the direction of the Secretary of the

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[4] The Ute Indian Tribe participating as an amicus in this case includes the descendants of those Indians; it consists of the Uintah, Uncompahgre, and White River Bands of Indians. See Constitution and By-Laws of the Ute Indian Tribe of the Uintah and Ouray Reservation 1 (1937).

Interior, shall be used for the benefit of said Indians." 32 Stat. 264.[5]

The allotments did not, however, proceed as provided for by the 1902 Act. Accordingly, Congress in 1903 directed the Secretary to allot the land unilaterally if the Indians did not give their consent by June 1 of that year. Act of Mar. 3, 1903, ch. 994, § 1, 32 Stat. 997-998. That Act also extended the time for the "opening [of] the unallotted lands to public entry on said Uintah Reservation" until October 1, 1904. 32 Stat. 998. When the Indians continued to oppose the plan,[6] Congress again deferred the opening date, to March 10, 1905. Act of Apr. 21, 1904, ch. 1402, § 1, 33 Stat. 207-208.

By the Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048 (1905 Act), Congress again deferred the time for opening the unallotted lands to public entry, this time

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[5] A month later, Congress supplemented the 1902 Act with a provision requiring the Secretary.

> [i]n addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, * * * [to] select and set apart for the use in common of the Indians of that reservation such an amount of non-irrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock

J. Res. 31, 57th Cong., 1st Sess., 32 Stat. 744 (1902).

[6] Only 82 of the 280 adult male Indians eligible to vote approved the transaction. See H. R. Doc. No. 33, 58th Cong., 1st Sess. 5 (1903).

to September 1, 1905, unless the President determined that the lands should be opened at an earlier date. Section 1, 33 Stat. 1069. The March 1905 Act then specified "the manner of opening such lands for settlement and entry, and for disposing of the same." *Ibid.* Specifically, it provided that the unallotted lands (except for such tracts as might be set aside as a national forest service, and certain mineral lands disposed of in 1902) "shall be disposed of under the general provisions of the homestead and townsite laws of the United States." *Ibid.*[7] All lands "opened to settlement and entry under this Act remaining undisposed of [within five years]" were to "be sold and disposed of for cash, under rules and regulations * * * prescribed by the Secretary of the Interior." 33 Stat. 1070. The proceeds of the sale of unallotted lands were to be applied, in accordance with the 1902 Act, for the benefit of the Indians. 1905 Act, § 1, 33 Stat. 1070.

The government failed to obtain the consent of the Indians to the arrangement. Nevertheless, President Roosevelt issued a Proclamation on July 14, 1905, which declared that "the unallotted lands in [the Uintah Indian] Reservation * * * will on and after the 28th day of August, 1905, * * * be opened to

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[7] The 1905 Act also authorized the President, before opening the reservation to entry, to set aside additional lands for the Uintah Forest Reserve that had been established adjacent to the Reservation in 1897, as well as for reservoir and other water-supply purposes. 33 Stat. 1070.

entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States." 34 Stat. 3120.[8]

2. In 1989, petitioner was charged with distribution of a controlled substance in the District Court of Duchesne County in Utah. The offense occurred in the town of Myton, which lies within the original exterior boundaries of the Uintah Indian Reservation, in an area that was opened to non-Indian settlement under the 1905 Act. Petitioner initially pleaded guilty.

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[8] On the same day, President Roosevelt, acting pursuant to the 1905 Act, see note 7, *supra*, set aside about 1,010,000 acres within the Reservation as an addition to the Uintah Forest Reserve. 34 Stat. 3116. In 1931, Congress appropriated $1,217,221.25 to compensate the Indians for 973,777 acres of those lands, at the rate of $1.25 per acre. Act of Feb. 13, 1931, ch. 124, 46 Stat. 1092-1093. Congress compensated the Indians for the remainder of the forest reserve lands in 1956 by restoring to the Indians the title to the mineral resources on those remaining lands. Act of July 14, 1956, ch. 603, 70 Stat. 546. Pursuant to the 1905 Act, see note 7, supra, the President also withdrew certain lands for reservoir purposes, by proclamations issued on August 3 and August 14, 1905. 34 Stat. 3141-3143, 3143-3144. As to those lands, Congress in 1910 appropriated funds to pay the Indians $1.25 per acre, in return for which "[a]ll right, title, and interest of the Indians in the said lands [were t]hereby extinguished." Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285. The last major congressional action with respect to the Reservation came in 1948, when Congress "extended" the "exterior boundary of the Uintah and Ouray Reservation" to include a tract of approximately 510,000 acres, commonly referred to as the "Hill Creek Extension." Act of Mar. 11, 1948, ch. 108, § 1, 62 Stat. 72. The status of the forest reserve land, the reservoir land, and the Hill Creek Extension is not at issue in this case.

Before sentencing, however, petitioner filed a motion to arrest the judgment and to withdraw his guilty plea; he contended that the trial court did not have jurisdiction because he is an Indian and the crime had been committed in "Indian country" that is not subject to the jurisdiction of the State of Utah.[9] The trial court denied that motion, finding that petitioner is not an Indian for purposes of principles governing state jurisdiction over crimes committed by or against Indians in Indian country. Pet. App. I; see Pet. App. A.

3. The Utah Court of Appeals reversed. *State* v. *Hagen*, 802 P.2d 745 (1990). The court of appeals noted that the Tenth Circuit has held that Myton and other areas opened to non-Indian settlement by the 1905 Act remain within the Uintah Indian Reservation. *Id.* at 747 (citing *Ute Indian Tribe* v. *Utah*, 773 F.2d 1087 (1985) (en banc), cert. denied, 479 U.S. 994

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[9] The term "Indian country" is defined by 18 U.S.C. 1151 to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent." See *Oklahoma Tax Commission* v. *Sac and Fox Nation*, No. 92-259 (May 17, 1993), slip op. 8-11. As a general matter, a State has jurisdiction over an offense committed by or against an Indian in Indian country only where Congress has granted jurisdiction to the States – *e.g.*, in a special jurisdictional statute, see *Negonsott* v. *Samuels*, 113 S. Ct. 1119 (1993), or in Public Law 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-590, see *Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470 (1979). Utah has not acquired jurisdiction over the Indian country at issue here pursuant to either a special jurisdictional statute or Public Law 280.

(1986)). The court also concluded that the State failed to introduce sufficient evidence in the trial court to justify a finding that petitioner is not an Indian. 802 P.2d at 747-748. Accordingly, the court reversed petitioner's conviction and ordered him discharged. *Id.* at 748.

4. The Utah Supreme Court granted the State's petition for a writ of certiorari and reversed the Utah Court of Appeals. Pet. App. A1. In a brief opinion, the court explained that it viewed the case as controlled by its decision the same day in *State* v. *Perank*, No. 860243 (July 17, 1992), *reprinted in* Resp. App. 4a-75a.[10] In *Perank*, the Utah Supreme Court concluded that the provisions of the 1902 Act and the 1905 Act opening lands to non-Indian settlement diminished the Uintah Indian Reservation and that the town of Myton accordingly lies outside the boundaries of the Reservation. See *id.* at 28a-63a. Relying on *Perank*, the Utah Supreme Court reinstated petitioner's conviction. Pet. App. A1.

SUMMARY OF ARGUMENT

A. This Court's decision in *Solem* v. *Bartlett*, 465 U.S. 463 (1984), establishes a clear-statement rule for resolution of claims that Congress has diminished the boundaries of an Indian reservation. Under that rule, an Act of Congress generally does not

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[10] "Resp. App." refers to the appendix to the brief of respondent in support of the petition

diminish a reservation unless the Act includes both "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests" and "an unconditional commitment from Congress to compensate the Indian tribe." *Id.* at 470. A limited exception permits a finding of diminishment "[w]hen events surrounding the passage of [the statute] * * * unequivocally reveal a widely held, contemporaneous understanding that [the statute would diminish the reservation]," *id.* at 471; the statute involved in the instance cited in *Solem* for that proposition (unlike the statute at issue here) contained clear language of cession.

B. The Acts at issue here do not satisfy either requirement of the clear-statement rule articulated in *Solem*. First, they do not require unconditional compensation; rather, the compensation was limited to a share of any proceeds the United States would obtain if it was successful in disposing of the opened lands. Second, the statutes do not make any explicit reference to cession, or in any other way state that the Indians were surrendering all of their interests in the opened lands.

The only feature of the statutes that points toward a finding of diminishment is the statement in the 1902 Act that the opened lands were to be "restored to the public domain." Section 1, 32 Stat. 263. But, as the Court in *Solem* explained, such a reference is not sufficient to justify a finding of diminishment, because it could simply mean that the lands in question were returned to the public domain in the

sense that they became available for non-Indian settlement; the languaeg does not expressly indictate that the lands were to be removed from the Reservation. See *Solem*, 465 U.S. at 475 n.17. Moreover, even if such a reference might in some circumstances be adequate to justify a finding of diminishment, it would not suffice here because it was included only in the 1902 Act, not the 1905 Act under which the unallotted lands on the Uintah Indian Reservation actually were opened to settlement.

C. This case does not involve the type of widely held understanding that would justify finding a reservation diminished even though the statute does not satisfy both aspects of the clear-statement rule articulated in *Solem*. Because only Congress has the power to alter the boundaries of a reservation, the only understanding that should suffice is an understanding shared by Congress and the affected Indians. In this case, there is no basis for supposing that the Indians understood the 1905 Act would alter the boundaries of the Reservation, nor is there any explicit statement in the legislative history that the 1905 Act would have that effect. Accordingly, there is no basis for further investigation of secondary materials. In any event, because those materials are rife with inconsistency and contradiction, they cannot "unequivocally" reveal a widely held understanding sufficient to diminish the Reservation. *Solem*, 465 U.S. at 471.

ARGUMENT

The UINTAH INDIAN RESERVATION WAS NOT DIMINISHED BY THE 1905 ACT OR ITS 1902 PREDECESSOR

A. A Reservation Is Diminished Only When Congress Enacts A Statute Using Unambiguous Language Of Cession, And Either Congress Grants Unconditional Compensation To The Indians, Or There Is An Unequivocal And Widely Held Contemporaneous Understanding That The Reservation Is Diminished

Like several of this Court's previous cases, the present controversy turns on the effect of a surplus land Act opening an Indian reservation to settlement by non-Indians. The Congress that passed that Act (and others like it) no doubt anticipated the eventual demise of the reservation system. But the Court has "never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act. Rather, it is settled law that some surplus land acts diminished reservation,[11] and other surplus land Acts did not.[12] *Solem* v. *Bartlett,* 465 U.S. 463,

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[11] See, *e g , Rosebud Sioux Tribe* v. *Kneip,* 430 U S. 584 (1977); *DeCoteau* v *District County Court,* 420 U.S. 425 (1975).

[12] See, *e g , Mattz* v *Arnett,* 412 U S 481 (1973); *Seymour* v. *Superintendent,* 368 U S. 351 (1962)

468-469 (1984) (citations omitted).[13]" As explained in *Solem,* the Court's prior decisions have established a "fairly clean analytical structure" for distinguishing those surplus land Acts that of their own force effected an immediate diminishment of the reservation from those that permitted non-Indians to purchase land within an existing reservation and left to another day the actual redrawing of its boundaries. *Id.* at 470.

The "first and governing principle" is that "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem,* 465 U.S. at 470. The dispositive question, then, is whether "Congress [has] clearly

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[13] As the Court noted in *Solem,* the precise location of reservation boundaries "seemed unimportant" at the time the surplus land Acts were passed. 465 U S at 468 Until 1913, Indian title, not the reservation boundary, generally determined which sovereign had jurisdiction over a particular tract of land. See, e g , *Bates* v. *Clark,* 95 U S 204, 208-209 (1877); *Ex parte Crow Dog,* 109 U S 556, 560-462 (1883) In 1913, however, this Court initiated an expansion of the judicial definition of Indian country to include lands that had been reserved and set apart as an Indian reservation by Executive Order, even though they were not owned by Indians *Donnelly* v *United States,* 228 U S 243, 268-269 (1913) The expansion culminated in 1948, when Congress enacted a statutory definition of Indian country that includes lands held in fee by non-Indians within reservation boundaries. Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S C 1151(a)); see generally *Solem,* 465 U S. at 468 (summarizing the expansion of the concept of Indian country)

evince[d] an intent to change boundaries." *Ibid.* (internal quotation marks, ellipses, and citation omitted). The most probative evidence bearing on that question is the statutory language used to open the reservation. Language that "[e]xplicit[ly] refer[s] to cession" or otherwise "evidenc[es] the present and total surrender of all tribal interests" in the opened area suggests that Congress meant to sever it from the reservation. *Ibid.* When such language is buttressed by an unconditional commitment to compensate the tribe, "there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Id.* at 470-471.[14]

Cession language and unconditional compensation are not, however, absolute prerequisites to a finding of diminishment. As explained in *Solem,* "[w]hen events surrounding the passage of a surplus land Act * * * unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," the Court has inferred that Congress shared that understanding and intended to diminish the reservation. *Solem,* 465 U.S. at 471. That portion of the *Solem* opinion was explaining the holding in

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[14] In the presence of both of those factors, the Court found a reservation to have been extinguished in *DeCoteau* v *District County Court,* 420 U.S 425, 431-449 (1975) In the presence of neither factor, the Court found reservations not to have been diminished in *Salem,* 465 U S at 472-476; *Mattz* v *Arnett,* 412 U S. 481, 494-505 (1973); and *Seymour* v. *Superintendent,* 368 U S 351, 355-356 (1962).

Rosebud Sioux Tribe v. *Kneip*, 430 U.S. 584 (1977).[15] In that case, the Court concluded that a reservation had been diminished by a statute that, although it contained language of cession, did not offer payment to the Indians of a sum certain as compensation; the *Rosebud* Court relied heavily on the fact that the statute was designed to implement an agreement with the Indians that used language of cession and indisputably provided for diminishment of the reservation. See *id.* at 591-595. The *Solem* Court made clear, however, that the holding in *Rosebud* was not to be given broad application, emphasizing that "[t]here are * * * limits to how far [the Court] will go to decipher Congress' intention in any particular surplus land Act," - limits that require "substantial and compelling evidence of a congressional intention" to diminish in order to justify a ruling that a reservation has been diminished. 465 U.S. at 472. That requirement is consistent with the general rule that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *South Dakota* v. *Baurland*, No. 91-2051 (June 14, 1993), slip op. 7 (quoting *County of Yakima* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, 112 S. St. 683, 693 (1992)).

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[15] See *Solem*, 465 U.S. at 471 (stating that "our opinion in *Rosebud Sioux Tribe* demonstrates" the accuracy of the discussion at hand)

B. Neither The 1905 Act Nor Its 1902 Predecessor Contained A Provision For Unconditional Compensation Of The Indians Or Language Of Cession

1. *The 1905 And The 1902 Act Did Not Provide For Payment Of A Sum Certain To The Indians*

As the Court has explained, an important indicator of congressional intent to alter reservation boundaries is the contemporaneous appropriation of funds to provide unconditional compensation – payment of a "sum certain"[16] – to the Indians for the lands being opened to settlement. See *Solem*, 465 U.S. at 470-471. Neither the 1905 Act nor the predecessor 1902 Act providing for the opening of unallotted lands on the Uintah Indian Reservation furnished unconditional compensation to the Tribe. As mentioned above, the sole compensation offered the Indians was to come from whatever proceeds the government might obtain from the disposition of the unallotted lands. 1905 Act, § 1, 33 Stat. 1070 (incorporating by reference the provisions for application of the proceeds in Section 1 of the 1902 Act, 32 Stat. 264).[17] Hence, the

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[16] See *Solem*, 465 U S at 469 n 10; *Rosebud*, 430 U S at 598 n.20; *DeCoteau*, 420 U S at 446, 448

[17] That conditional payment obligation differs from the compensation later made by the United States for the forest reserve and reservoir lands discussed in note 8, *supra* See also 32 Stat 264 (provision of the 1902 Act providing that $70,064.48 was "to be paid to the Uintah and White River Utes" to cover

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government was under no obligation to compensate the Indians at all unless it was successful in disposing of the unallotted lands.[18]

The discussion of the payment mechanism in this Court's earlier decisions makes it clear that the arrangement for the Uintah Indian Reservation was not the type of unconditional compensation or sum-certain payment that suggests an intention on the part of the Congress to diminish a reservation.[19] The

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various claims of the Indians against the United States, if those Indians consented to the allotment described in the 1902 Act)

[18] The legislative history suggests that Congress clearly understood the difference between the two modes of payment, and understood that the Indians had a strong preference for unconditional compensation. The Commissioner of Indian Affairs testified at a hearing before the Senate Committee on Indian Affairs:

> It will make a great difference in negotiating with [the Indians on the Uintah Indian Reservation] whether you propose to pay a cash amount or pay them as the land is sold. The system of paying the Indians for land as it is being sold has not proved the success it was hoped it would be. The Indians are afraid of it. But, generally speaking, the Indians will under certain conditions consent to sell their land if they are paid a cash sum.

S. Doc. No. 212, 57th Cong., 1st Sess. 5 (1902).

[19] See *Solem*, 465 U.S. at 469 n. 10 (describing statute at issue in *Seymour* v. *Superintendent*, 368 U.S. 351, 356 (1962), under which "the Colville Tribe received whatever proceeds these sales generated, rather than a sum certain"); *ibid.* (distinguishing between "sum-certain payment" and "a provision guaranteeing the Tribe only the proceeds from the sale of the opened lands"); *DeCoteau*, 420 U.S. at 448 (describing "contrast"

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method of compensation closely resembles the arrangements under the statutes that were found not to have effected a diminishment in *Solem*, 465 U.S. at 473; *Mattz* v. *Arnett*, 412 U.S. 481, 495 (1973); and *Seymour* v. *Superintendent*, 368 U.S. 351, 355-356 (1962). See *DeCoteau* v. *District County Court*, 420 U.S. 425, 447-449 (1975) (discussing that aspect of *Mattz* and *Seymour*).[20] Accordingly, the lack of unconditional compensation suggests that neither the 1905 Act nor its 1902 predecessor altered the boundaries of the Uintah Indian Reservation.[21]

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between agreement providing for "a sum certain" and agreement that "benefited the tribe only indirectly, by establishing a fund dependent on uncertain future sales of its land to settlers"); *ibid* (describing contrast between statute that "provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefits" and "a straightforward agreement ceding lands to the Government for a sum certain")

[20] A statute involving a similar conditional compensation arrangement was found adequate to diminish a reservation in *Rosebud*. But the statute at issue in *Rosebud* contained explicit language of cession and, as *Solem* explains, further rested on the existence of a "widely held, contemporaneous understanding" sufficient to justify diminishment even where the statute itself did not satisfy the normal requirements for a finding of congressional intent to diminish. 465 U.S. at 471-472. We discuss *Rosebud* at length in Point C, *infra*.

[21] Cf. *Ash Sheep Company* v. *United States*, 252 U.S. 159, 164-166 (1920) (Indians retain equitable interest in lands ceded to United States where United States undertook to sell lands for benefit of the Indians)

2. *Neither The 1905 Act Nor Its 1902 Predecessor Contained Language Of Cession*

a. *The Act of March 3, 1905.* – Analysis of the relevant statutory language begins with the 1905 Act, the statute under which President Roosevelt opened a portion of the Reservation to non-Indian settlement. It was in the 1905 Act that Congress specified "the manner of opening [unallotted] lands for settlement and entry, and for disposing of the same." Section 1, 33 Stat. 1069. In particular, the 1905 Act provided that the "unallotted lands on the Uintah Reservation * * * shall be disposed of under the general provisions of the homestead and town-site laws of the United States." *Ibid.* That language does not refer to a "cession" or otherwise "evidenc[e] the present and total surrender of all tribal interests" in the opened lands. *Solem*, 465 U.S. at 470. Rather, it closely resembles the language of the statutes at issue in *Solem*, *Seymour*, and *Mattz*.[22] As a unanimous Court explained in each of those cases, such statutes did not terminate the reservation, but merely "open[ed] the way for

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[22] See Act of June 17, 1892, ch. 120, 27 Stat. 52 (Act at issue in *Mattz*, providing that excess lands were "subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands"), Act of Mar. 22, 1906, ch. 1126, § 3, 34 Stat. 81 (Act at issue in *Seymour*, providing that excess lands "shall be open to settlement and entry under the provisions of the homestead laws"); Act of May 29, 1908, ch. 218, § 2, 35 Stat. 461 (Act at issue in *Solem*, providing for the disposition of unallotted lands under the "general provisions of the homestead and town-site laws of the United States")

non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Seymour*, 368 U.S. at 356 (quoted in *Mattz*, 412 U.S. at 497, and in *Solem*, 465 U.S. at 473).

The operative language here and in those cases contrasts sharply with that of the statutes at issue in *DeCoteau* and *Rosebud*, the two recent cases in which the Court has found that reservation boundaries were altered by Congress. See *DeCoteau*, 420 U.S. at 445 (statute provided that the Indians did "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands," Act of Mar. 3, 1891, ch. 543, 26 Stat. 1036); *Rosebud*, 430 U.S. at 596-597 (statute provided that Indians did "hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted," Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254). In sum, the 1905 Act contains neither an "[e]xplicit reference to cession" nor any other "language evidencing the present and total surrender of all tribal interests" in the portion of the Reservation opened to non-Indian settlement. Accordingly, under *Solem*, it fails to demonstrate a clear congressional intention to alter the boundaries of the Uintah Indian Reservation.

b. *The Act of May 27, 1902.* – The 1902 Act likewise does not contain language demonstrating

that Congress provided for the total surrender of all tribal interests in the portions of the Reservation that were opened to non-Indian settlement. Like the 1905 Act, the 1902 Act does not refer to any cession, sale, extinguishment, or conveyance of tribal lands.

The 1902 Act did state that unallotted lands eventually would "be restored to the public domain." Section 1, 32 Stat. 263. As the Court explained in *Solem*, a statement that lands have been restored to the public domain can point in the direction of diminishment, on the understanding that lands set aside in a reservation are, in some sense, removed from the public domain. Indeed, the 1902 Act's reference to "restor[ation] to the public domain" was the principal basis for the decision of the Utah Supreme Court in *Perank*, Resp. App. 20a-28a, on which that court relied in this case. In our view, however, the Utah Supreme Court gave insufficient deference to this Court's decision in *Solem*, the most recent occasion on which this Court considered the effect of a statute referring to a restoration of reservation lands to the public domain.[23] In *Solem*, the Court characterized

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[23] The Utah Supreme Court in *Perank* also relied on passages in this Court's opinions in *Seymour* and *Rosebud*. Resp App 20a-21a. Neither passage was related directly to the issues before the Court in those cases In any event, even if they are taken at face value, neither reference would shed much light on the statute at issue here First, the Court in *Seymour* referred in passing to a statute not at issue in the case, which had vacated and restored to the public domain" a portion of the reservation at issue 368 U S. at 354 (quoting Act of July 1, 1892, ch. 140,

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such a reference as "hardly dispositive," noting that "even without diminishment, unallotted opened lands could be conceived of as being in the 'public domain' inasmuch as they were available for settlement." 465 U.S. at 475 & n.17;[24] see also *Newhall v. Sanger*, 92

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§ 1, 27 Stat. 63). The Court implicitly assumed that the 1892 Act had diminished the boundaries of the reservation. That comment does not shed much light on the meaning of the 1905 Act, which does not use the term "vacated," a term that expresses a concept of extinguishment completely absent from the language at issue here.

Similarly, the *Rosebud* Court accepted the parties' understanding that the Act of March 2, 1889, ch. 405, § 21, 25 Stat. 896, terminated a portion of the Great Sioux Reservation by providing that it was "restored to the public domain." 430 U.S. at 589 & n.5. As the Court noted, however, that termination was accomplished with the agreement of three-fourths of the adult male Indians on the Reservation, as required by the treaty between the United States and the Sioux Nation. See *ibid.* If diminishment were found here, it would have occurred without the consent of the Indians. Moreover, the overall thrust of the 1889 Act concerning the Great Sioux Reservation, as set forth in its title, was to divide the Reservation "into separate reservations and to secure the relinquishment of the Indian title to the remainder," 25 Stat. 888 (see *Hodel v. Irving*, 481 U.S. 704, 706 (1987)), and the land restored to the public domain was that lying "outside of the separate reservations," § 21, 25 Stat. 896. The substitution of six smaller reservations for the single Great Sioux Reservation, and the assignment of individual Sioux members to one of the six reservations (see §§ 1-6, 16), was the functional equivalent of the cession of the remainder.

[24] Significantly, the "public domain" argument rejected by the Court in *Solem* was advanced not only by the petitioner in that case, but also by the Counties of Duchesne and Uintah, Utah, which appeared as amici, presumably because of the reference to the public domain in the 1902 Act concerning the Uintah Reservation. See 465 U.S. at 475 n.16.

U.S. 761, 763 (1876) ("The words 'public lands' are habitually used * * * to describe such as are subject to sale or other disposal under general laws.").[25]

Moreover, even if a reference to the "public domain" might in some circumstances be sufficient to justify a finding of diminishment, Congress's omission of that phrase from the 1905 Act makes it particularly inappropriate to place significant weight on the reference in this case. As discussed above, the 1902 Act – in which the only reference to the "public domain" appears – conditioned implementation on the consent of the Indians. Section 1, 32 Stat. 263-264. Despite several extensions, that consent was not forthcoming. Notwithstanding the absence of consent, Congress finally provided in the 1905 Act for the allotment and subsequent opening of surplus lands to non-Indian settlement. Significantly, however, the 1905 Act, under which the Reservation was opened, did not carry forward the 1902 Act's reference to the "public domain"; instead, the 1905 Act itself specified "the manner of opening [unallotted] lands for settlement and entry," substituting a more detailed

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[25] Cf *Utah Division of State Lands* v *United States*, 482 U S 193, 206 (1987); *Amoco Production Co* v. *Village of Gambell*, 480 U S 531, 548-549 n.15 (1987) In evaluating the significance of a reference to lands being in the "public domain," it is important to recall that at the time the statute containing that reference was enacted, the question whether the opened lands continued to be a portion of the reservation would have had little practical significance; it would not, for example, have affected criminal jurisdiction See note 13, *supra*

statement that the lands would be "disposed of under the general provisions of the homestead and town-site laws of the United States." Compare 1902 Act, § 1, 32 Stat. 263, with 1905 Act, § 1, 33 Stat. 1969.[26] As in earlier cases in which Congress failed to enact bills that more clearly suggested an intent to diminish or disestablish a reservation, Congress's abandonment of the public domain language suggests that any effort "to terminate the reservation * * * failed completely." *Mattz*, 412 U.S. at 504.[27]

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[26] The differences between the two statutes are not limited to the deletion of the reference to the "public domain." Under the 1902 Act, Congress provided that "*all the unallotted lands* within said reservation *shall be restored to the public domain.*" 32 Stat. 263 (emphasis supplied). The 1905 Act, by contrast, provided more generally that the "unallotted lands [except for mineral lands and lands for a forest reserve] shall be disposed of [under the homestead laws] and shall be opened to settlement and entry by proclamation of the President," 33 Stat. 1069, and also authorized the President to set aside lands "necessary to conserve and protect the water supply for the Indians or for general agricultural development," 33 Stat. 1070.

[27] The proposition that Congress retreated in the face of continued opposition on the part of the Ute Indians on the Uintah Indian Reservation is supported by Congress's continued efforts to gain that consent over a period of several years. See S. Doc. No. 212, 57th Cong., 1st Sess. 4 (1902) (statement of Commissioner of Indian Affairs at congressional hearing of his "understand[ing] that there is a treaty arrangement with those Indians which will make it necessary for you to treat with them before it can be thrown open to settlement"); see *id.* at 5 (discussing failure of previous negotiations). Those persistent negotiating efforts contrast favorably with Congress's treatment of the neighboring Uncompahgre Indians, with respect to whom Congress – in the same statute that appointed the first

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At bottom the Utah Supreme Court's analysis rests on the conclusion that the 1905 Act evidenced an intent to diminish the Uintah Indian Reservation by implicitly incorporating a phrase from the 1902 Act. Given the omission of that phrase from the 1905 Act, the failure of the conditions on which the 1902 Act was predicated, and the ambiguity of the phrase in the first place, the use of the phrase "public domain" in the 1902 Act fails to carry the State's burden of showing "that Congress clearly evince[d] an intent to change [the] boundaries" of the Reservation. *Solem*, 465 U.S. at 470 (internal quotation marks, ellipses, and citation omitted).[28]

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commission to seek consent from the Ute Indians – authorized unilateral and immediate allotment. See Act of Aug. 15, 1894, ch. 290, § 20, 28 Stat. 337-338. As a contemporary House Report explained, the difference in treatment rested on Congress's view that the Uncompahgres had only "the privilege of temporary occupancy," while the Uintah Reservation Indians were "the owners of the lands within the reservation, because * * * it was provided that the lands within the Uintah Reservation should be 'set apart for the permanent settlement and exclusive occupation of the Indians.'" H. R. Rep. No. 660, 53d Cong., 2d Sess. 1, 2-3 (1894) (quoting Act of May 5, 1864, ch. 77, § 2, 13 Stat. 63).

[28] An additional feature of the statutes that suggests they were not intended to alter the boundaries of the reservation is the absence of a specific statutory description of the land that was, in respondent's view, removed from the Reservation. In *DeCoteau* and *Rosebud*, the relevant statutes precisely described the areas that were found to have been removed from reservation status; the finding of diminishment in those cases therefore comported with the requirement that Congress itself must "clearly evince an 'intent to change boundaries'" *Solem*, 465 U.S. at 470 (quoting *Rosebud*, 430 U.S. at 615). By contrast,

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C. The 1905 Act And The 1902 Act Do Not Reflect An Unequivocal And Widely Held Contemporaneous Understanding That They Would Diminish The Uintah Indian Reservation

Relying on the decision in *Rosebud,* the Court stated in Solem that in some cases a statute will be held to diminish or extinguish an Indian reservation even if it does not bear all of the usual marks of such a statute – express language of cession and unconditional compensation for the Indians. In the words of the *Solem* Court, that result is appropriate

> [w]hen events surrounding the passage of a surplus land Act – particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress – unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation.

465 U.S. at 471.

The circumstances of *Rosebud* that were held sufficient to justify diminishment illustrate the narrowness of that exception to the general rule. *Rosebud* involved an unequivocal and universally

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in this case Congress did not describe the areas of the Uintah Indian Reservation that were to be opened to non-Indian settlement, but instead left it to the Executive Branch to identify such lands in the future

shared understanding among the participants to the transaction that the statute in question (the Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254) would diminish the boundaries of the Rosebud Sioux Reservation. In particular, it is clear that the Indians had agreed to a diminishment of the Reservation; in 1901, three-fourths of the adult male Indians on the Rosebud Sioux Reservation had executed an agreement (negotiated by Inspector James McLaughlin)[29] under which they would "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to" the land in question, in return for an unconditional payment of just over $1,000,000. See *Rosebud,* 430 U.S. at 590591 & n.8.[30] Because Congress was unwilling to agree to outright payment for the lands, Inspector McLaughlin returned to that Reservation to renegotiate the agreement. See id. at 591-592. Although he failed to secure the consent of three-fourths of the adult male Indians, he did secure the consent of a simple majority to a 1903 agreement that – using the same language of cession as the 1901 agreement – made payment contingent upon

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[29] Interestingly, Inspector McLaughlin also conducted the unsuccessful negotiations with the Sioux Indians over the land at issue in *Solem,* see 465 U S at 476-477, and with the Ute Indians over the land at issue in this case, see H R. Doc No 33, 58th Cong., 1st Sess 3-7 (1923) (report by Inspector McLaughlin of unsuccessful negotiations)

[30] The applicable treaty with the Sioux Indian Nation provided that no treaty for cession of any part of its reservation would be valid without the consent of three-fourths of the adult male Indians on that reservation See *Rosebud,* 430 U S at 589

successful sale of the land, with the compensation per acre raised from $2.50 to $2.75. See *id.* at 592-594. Congress promptly enacted a statute that set forth the 1901 agreement in its entirety, and then "accepted, ratified, and confirmed [that Agreement] as * * * amended and modified" to delete the obligation of unconditional compensation. Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254-256; see *Rosebud*, 430 U.S. at 594-597.

As the *Rosebud* Court explained, a ruling that the Rosebud Sioux Reservation was not diminished by the 1904 Act at issue there could only have frustrated congressional intent. The statute used unequivocal language of cession, and adopted an agreement of the Indians that unequivocally approved the cession (albeit with modifications approved by only a simple majority of the adult male Indians). Inspector McLaughlin advised the Indians in unambiguous language that both the 1901 and the 1903 Agreements, if enacted by Congress, would alter the boundaries of the Reservation. See *Rosebud*, 430 U.S. at 591-593. The legislative history reviewed by the Court contained "no indication that Congress intended to change anything [from the 1901 Agreement] other than the form of, and responsibility for, payment," *id.* at 594-595, and the House Report in fact flatly stated that the bill would "ratify and amend an agreement * * * providing for the cession to the United States of the unallotted portion of [the Indians'] lands," see *id.* at 595 (quoting H.R. Rep. No. 443, 58th Cong., 2d Sess. 3 (1904)).

Application of the *Rosebud* analysis to this case shows that whatever the desires of individual Members of Congress, there is no evidence – let alone unequivocal evidence – of a widely held contemporaneous understanding that the opened lands would be removed from the Uintah Indian Reservation. First, there is no document in this case that establishes the "unmistakable baseline purpose of disestablishment" that was so important to the Court in *Rosebud*, 430 U.S. at 592; none of the relevant documents – the 1905 Act, the previous Acts dealing with the Reservation, or any agreement with the Indians – uses the indisputable language of cession that was a feature of all of the relevant documents in *Rosebud*. Moreover, in our view, the requirement in *Solem* that the "understanding" be "widely held" requires proof that the Indians shared in an understanding that alteration of the Reservation's boundaries was at hand; the only obvious manifestation of such an understanding on the part of the Indians is an agreement of cession, like the one approved in *Rosebud*. Because the Indians in this case steadfastly refused to consent to any alteration of the Reservation boundaries, there is no such agreement in this case.[31] Accordingly, it

[31] Indeed, as Inspector McLaughlin explained, the Indians on the Uintah Indian Reservation firmly believed "that their reservation could not be opened to settlement without their consent," and that "they were thus advised by officials of the Department [of the Interior] during their visit to Washington." *H.R. Doc. No. 33*, 58th Cong., 1st Sess. 5 (1903). The view of the Indians was not entirely unreasonable, considering the date of the negotiations in question – May 1903, only four months after

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would be inappropriate to rely on "understandings" to conclude that the Reservation was diminished.

The Utah Supreme Court's contrary conclusion rested to a considerable degree on its understanding of a variety of materials regarding the contemporaneous and subsequent understanding of the 1902 and 1905 Acts. Resp. App. 44a-61a. For two reasons, we do not believe that those materials support the decision of the court below. First, although the Court's decision in this area frequently have mentioned such materials, we believe they have at best only limited relevance. See *Solem*, 465 U.S. at 471 (noting that the Court has considered such materials relevant "[t]o a

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this Court's January 1903 decision in *Lone Wolf* v *Hitchcock*, 187 U.S. 553, 566-568, first upheld the power of Congress to diminish a reservation unilaterally.

Given the Indians' view on that question, the Utah Supreme Court erred in relying (Resp. App 37a) on Inspector McLaughlin's advice to the Indians that "there will be no outside boundary line to this reservation" Minutes of Council Meetings Between Inspector McLaughlin and the Ute Indians 42 (May 18-23, 1903), JX 162. "JX" refers to the joint exhibits of the parties in *Ute Indian Tribe* v *Utah*, 521 F. Supp 1072 (D. Utah 1981); the parties have stipulated that the record in this case includes the record in the *Ute Indian* case, see Resp App 164a-165a) In any event, the Indians' response to Inspector McLaughlin's advice was to reject the proposal by an overwhelming margin, see note 6, *supra* Because the allotment program under the 1902 Act was conditioned on the Indians' consent, it failed and was replaced by the program set forth in the 1905 Act, at issue here There is no suggestion that any representative of the government advised the Indians that the 1905 Act would alter the boundaries of the Reservation.

lesser extent" than the statutory text and other sources discussed above).[32] The suggestion of the *Solem* Court that a widely held, contemporaneous understanding in some cases could be sufficient to justify a finding of diminishment was not a license for the lower courts to conduct a wide-ranging investigation into the views that individual legislators and administrative officials took of legislation. Because only Congress and the Indian Tribes have the power to alter the limits of a Tribe's sovereignty, it is not appropriate to rest decisions regarding those limits on the views of third parties who could not themselves alter those limits.

Second, we do not believe that the historical record supports the Utah Supreme Court's view that both Congress and the Executive Branch understood the 1902 and 1905 Acts to alter the boundaries of the Uintah Indian Reservation. Rather, the historical record here, as in *Solem*, is "so rife with contradictions and inconsistencies as to be of no help to either side." 465 U.S. at 478. Most of the materials on which the Utah Supreme Court relied are ambiguous, indicating only that the land in question was to be

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[32] Moreover, it is not clear that such secondary materials have affected any of the Court's recent holdings in the area. As we explained in note 14, *supra*, all of the Court's recent decisions other than *Rosebud* can be explained by the bright-line rule articulated in *Solem*; and, as discussed above, *Rosebud* itself appears to rest primarily on the terms of congressional enactments and tribal agreements, rather than on the understanding other parties had of those documents.

restored to the "public domain."[32] As discussed above, such references, even in the opening statute itself, do not directly address the question at issue in this case.

To be sure, a few federal statutes enacted shortly after the 1905 Act referred to the Reservation as having been diminished by the 1902 and 1905 Acts.[34] But a number of other statutes apparently rested on the contrary assumption that the Reservation was not diminished by the 1902 and 1905 Acts.[35] Still

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[32] See, *e.g.*, Resp. App. 45a-46a (President Roosevelt's Proclamations), 51a-52a (subsequent statements of officials in the Department of the Interior), 54a-55a (1971 order of the Department of the Interior), 57a-60a (subsequent judicial decisions).

[34] Act of Jan. 27, 1906, ch. 7, 34 Stat. 9 (referring to "lands which were heretofore a part of the Uintah Indian Reservation"); Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285 (referring to "lands within the ceded Uintah Indian Reservation"); Act of July 20, 1912, ch. 244, § 1, 37 Stat. 196 (referring to "land which was formerly a part of the Uintah Indian Reservation"). As the Court in *Solem* explained in a similar context, those references may well have been referring to land as having left the common lands of the Reservation, rather than having left the Reservation entirely. 465 U.S. at 475 n. 17.

[35] Act of Aug. 1, 1914, ch. 222, § 21, 38 Stat. 604 (referring to "the bridge at Myton, on the Uintah Indian Reservation"); Act of Mar. 4, 1929, ch. 705, § 1, 45 Stat. 1584 (referring to "the State Experimental Farm * * * within the Uintah and Ouray Indian Reservation"); Act of Apr. 22, 1932, ch. 125, § 1, 47 Stat. 111 (same). Similarly, two statutes referred to an extension of the "exterior boundary" of the Reservation, a reference that assumes the Reservation remained a cohesive whole including the opened lands. Act of Mar. 11, 1948, ch. 108, § 1, 62 Stat. 72; Act of Aug. 9, 1955, ch. 263, 69 Stat. 544. See generally *Ute Indian Tribe* v. *Utah*, 521 F. Supp. 1072, 1133-1134 (D. Utah

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other statutes referred to the "former" Reservation, a reference that cannot be correct, because all agree that at least the allotted parcels continued to constitute a reservation.[36] Finally, on some occasions

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1981) (cataloguing legislative materials that assume the opened lands remain in the reservation), aff'd in relevant part, 773 F 2d 1087 (10th Cir. 1985) (en banc), cert denied, 479 U S 994 (1986).

An extensive number of statutes referred to the Reservation as continuing in existence Act of Mar. 3, 1921, ch 119, § 21, 41 Stat 1245 (obligation to construct bridge "free from all expense to the * * * Indians of the Uintah and Ouray Reservation"), Act of Mar. 4, 1931, ch 522, 46 Stat 1567 (appropriation for "[i]rrigation system, Uintah Reservation"); Act of Feb 2, 1932, ch. 12, 47 Stat 22 (same), Act of June 19, 1934, ch 648, § 1, 48 Stat. 1033 (same); Act of Aug 9, 1937, ch. 570, § 1, 50 Stat. 573 (referring to funds "apportioned to the Indians of the Uintah and Ouray Reservation"); Act of Mar 16, 1950, ch. 59, 64 Stat 19 (referring to the "Ute Indian Tribe of the Uintah and Ouray Reservation"); Act of Aug 21, 1951, ch 838, §§ 1-2, 65 Stat 194 (same); Act of Aug 27, 1954, ch 1009, §§ 1-2, 68 Stat. 868 (same), Act of July 14, 1956, ch 603, §§ 1-5, 70 Stat. 546-547 (same)

[36] Act of June 21, 1906, ch 3504, 34 Stat. 375 ("former Uintah Reservation"), Act of June 29, 1906, ch 3599, 34 Stat 611 ("former Uintah Indian Reservation"); Act of Apr. 4, 1910, ch 140, § 23, 36 Stat 285 ("former Uintah Reservation"), Act of May 14, 1920, ch 187, 41 Stat. 599-600 ("former Uintah Indian Reservation"); see also Presidential Proclamation of Sept. 1, 1906, 34 Stat 3228 (referring to the "former Uintah Indian Reservation"). Indeed, one statute referred to the "allotted lands of any Indian of the former Uintah * * * reservation," Act of Apr. 30, 1908, ch 153, 35 Stat 95, a reference that can make sense only on the understanding that the allotted lands had left the "reservation" in the general (though inaccurate) sense that they were no longer common lands set aside for and beneficially held by a tribe

contradictory references were included in the same Act.[37] As in *Solem*, the ready availability of "examples pointing in both directions leave[s] one with the distinct impression that subsequent Congresses had no clear view whether the opened territories were or were not still part of the * * * Reservation." 465 U.S. at 479.[38] Given the hazards involved in attempting to infer the intent of one Congress from the views of subsequent Congresses, see *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980), the inconsistent references contribute nothing of substance to the decision of this case.

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[37] Section 21 of the Act of Mar. 3, 1911, ch. 210, 36 Stat. 1073-1074, refers at one point to persons having made "homestead entry for land in the Uintah Indian Reservation"-a reference that assumes the opened lands remained in the Reservation-and later on the same page refers to "the proceeds of the sale of lands within the ceded Uintah Indian Reservation" – a reference that appears to rest on the opposite assumption. Similarly, the Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285, which compensated the Indians for land set apart for reservoir purposes, see note 8, *supra*, refers to those lands as lying "in the former Uintah Indian Reservation," but later in the same paragraph states that "[a]ll right, title, and interest of the Indians in the said lands are hereby extinguished."

[38] To the extent conclusions can be drawn from the legislative record, it appears that Utah's Senators Sutherland and Smoot were the principal sources of references suggesting that the 1902 and 1905 Acts had diminished the Reservation. Such references ceased shortly after Senator Sutherland's departure from the Senate in 1917. See *Ute Indian Tribe* v. *Utah*, 521 F. Supp. 1072, 1133 (D. Utah 1981), aff'd in relevant part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986).

Finally, the Utah Supreme Court relied on its belief that the Department of the Interior had treated the 1902 and 1905 Acts as having diminished the Reservation. See Resp. App. 52a-56a, 57a n.27. As with the statutory materials, many of the items on which the court relied do not address the question at hand.[39] The two formal notices of the Secretary on which the court relied are as ambiguous as much of the statutory material, although on balance they seem to support our understanding.[40] To be sure, some

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[39] The bulk of the materials the court cites at Resp. App. 57a n.27 do nothing more than refer incorrectly to the "former" Uintah Indian Reservation. See H.R. Rep. No. 5010, 59th Cong., 1st Sess. 1-2 (1906); Letter from C.F. Darrabee, Acting Commissioner of Indian Affairs, to H.C. Means (Sept. 26, 1907), JX 336; Letter from First Assistant Secretary of the Department of the Interior to Commissioner of Indian Affairs (Nov. 8, 1907), JX 338; Letter from Secretary of the Department of the Interior to Secretary of the Treasury (Dec. 19, 1908), JX 341. Moreover, given the limited information contained in those documents, it is difficult to ascertain whether the documents involved portions of the Reservation that were opened to settlement under the 1905 Act, rather than land that might have been affected by one of the other actions Congress had taken with respect to the Reservation.

[40] Although the 1945 Order Notice, 10 Fed. Reg. 12,409, discussed at length at Resp. App. 52a-54a, does state at one point that the lands not sold pursuant to the 1902 and 1905 Acts should be "added to and made a part of the existing reservation," at an earlier point it describes those lands as "lands which are now or may hereafter be classified as undisposed-of opened lands *of the Uintah and Ouray Reservation*." *Ibid.* (emphasis added). The latter reference rests on the assumption that the lands in question had never been severed from the Reservation. Similarly, the 1971 Order Notice, 36 Fed. Reg. 19,920, states

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of the items do include statements by lower level officials in the Department of the Interior indicating that the lands opened to non-Indian settlement under the 1905 Act were removed from the Reservation.[41] But, in light of the inconsistent practice of Congress and the Secretary, there is no basis for relying on those statements to provide a definitive resolution of the question against the Tribe.

* * * *

At bottom, the 1902 and 1905 Acts do not contain the clear expression of intent to change the Reservation's boundaries that this Court's cases have required. Nor can the State establish the type of widely shared understanding of the effect of those Acts that would justify treating the Acts as going farther than the terms Congress chose to express its action. The

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that the lands in question "were restored to the public domain"; it does not state that they were severed from the Reservation. Indeed, the notice refers at another point to "the undisposed-of opened lands of said reservation" being "restored to tribal ownership," suggesting that the opening of the lands had altered ownership but not severed the lands from the Reservation. *Ibid.* For a similar reference, see Commissioner of Indian Affairs, *Annual Report* 44 (1918), JX 394 (referring to "areas of unallotted land within this reservation" that had been opened to homestead entry).

[41] 1929 Annual Report of Uintah and Ouray Agent 1, JX 420; 1931 Annual Report of Uintah and Ouray Agent 4-6, JX 425; 1932 Annual Report of Uintah and Ouray Agent 1-2, JX 427; Bureau of Indian Affairs, Phoenix Area Office, *Information Profiles of Indian Reservations in Arizona, Nevada, & Utah* 151, 155 (1976), JX 480.

Tribe consistently refused to consent to any alteration of the Reservation's boundaries, and Congress never adopted any statute explicitly attempting to alter the boundaries unilaterally. Accordingly, this Court should hold that the Reservation was not diminished by the provisions of the 1905 Act, and its 1902 predecessor, that opened portions of the Reservation to non-Indian settlement.

CONCLUSION

The judgment of the Supreme Court of Utah should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MYLES E. FLINT
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Acting Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

EDWARD J. SHAWAKER
MARTIN W. MATZEN
Attorneys

JUNE 1993

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

No. 86-1436

YANKTON SIOUX TRIBE OF INDIANS, PETITIONER

v.

STATE OF SOUTH DAKOTA, ET AL.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION OPINIONS BELOW

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 796 F.2d 241. The prior opinion of the court of appeals is reported at 683 F.2d 1160. The opinion of the district court (Pet. App. 9-33) is reported at 604 F. Supp. 1146, and the prior opinions of the district court are reported at 566 F. Supp. 1507 and 521 F. Supp. 463.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1986, and a timely petition for rehearing was denied on November 7, 1986 (Pet. App. 34). On January 29, 1987, Justice Blackmun extended the time within which to file the petition for a writ of certiorari to and including March 9, 1987. The petition for a writ of certiorari was filed on March 4, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the title to the bed of Lake Andes, a shallow, navigable water body of approximately 4,000 acres in South Dakota. Lake Andes lies within the exterior boundaries of the Yankton Sioux Indian Reservation, which was established by the 1858 Treaty with the Yankton Tribe of Sioux, 11 Stat. 743 (Pet. App. 35-46). In 1803, the United States acquired sovereignty over the lands at issue by the Louisiana Purchase. In the years following 1803, the Yankton Sioux began moving into the general area in the vinicity of Lake Andes. Pet. 5. In Article I of the 1858 Treaty, the Tribe ceded and relinquished to the United States all of the lands claimed by them "except four hundred thousand acres thereof" (Pet. App. 36). The exterior boundary of this reservation was described in Article I, and Lake Andes falls within that boundary.

The State of South Dakota was admitted into the Union by the Act of February 22, 1889, ch. 180, 25 Stat. 676. Several years thereafter, in 1892, the United States and the Tribe entered into a cession agreement, which was later ratified by Congress as part of the Indian Department Appropriations Act of 1894, ch. 290, § 12, 28 Stat. 314-319. Article I of the Cession Agreement stated that the Indians "hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians [by the 1858 Treaty]" (28 Stat. 314). In return, Article II provided that "[i]n consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000)" (28 Stat. 315).

2. The Lake Andes Migratory Waterfowl Refuge was established by Executive Order No. 7292, dated February 14, 1936, "in order to effectuate further the purposes of the Migratory Bird Conservation Act (45 Stat. 1222) * * * ." In the following years, the Fish and Wildlife Service began to acquire property interests to allow it to control and manage Lake Andes as part of the Refuge. In 1939, the State of South Dakota and the United States executed an agreement by which the State, which had asserted title to the lakebed, granted the United States an exclusive and perpetual right to operate and maintain the lakebed for migratory waterfowl and wildlife conservation

purposes. Pet. App. 11-12. Since that time, Lake Andes has been managed by the Fish and Wildlife Service (or its predecessor agencies) in the Department of the Interior as the most important component of the Refuge.

3. In the summer of 1976, the bed of Lake Andes was dry and had become covered with vegetation. Three non-Indians obtained permits from the State and began to harvest kochia (fireweed) from the bed. The Tribe then intiated this action in the United States District Court for the District of South Dakota against the non-Indians, alleging that they were trespassing upon Indian lands. Subsequently, the State and Charles Mix County intervened as defendants, the individual defendants were dismissed from the suit, and the case proceeded, in essence, as a quiet title action. Pet. App. 3, 12.

On September 19, 1981, the district court entered summary judgment in favor of the Tribe. *Yankton Sioux Tribe v. Nelson*, 521 F. Supp. 463. The court ruled that the Tribe held aboriginal title to the lakebed prior to the 1858 Treaty, that its aboriginal title was not expressly extinguished by the United States, and that, for this reason, title to the lakebed had not passed from the United States to the State, under the Equal Footing Doctrine, upon its admission to the Union. See Pet. App. 3-4.

The court of appeals vacated the district court's judgment and remanded the case without resolving the merits. 683 F.2d 1160 (1982). Rather, noting that

the parties were advancing conflicting theories of ownership that depended upon whether Lake Andes was navigable at various times, the court of appeals instructed the district court to make findings concerning the navigability of the Lake at the time of the 1858 Treaty and at the time South Dakota was admitted to the Union in 1889. See Pet. App. 4.

4. On remand, the district court found that Lake Andes was navigable in law and in fact at the relevant times and again entered judgment in favor of the Tribe. 566 F. Supp. 1507 (1983).

In September 1983, while post-judgment motions were pending before the district court, the United States moved to intervene as a plaintiff. The motion to intervene was accompanied by a proposed complaint and cross-claim, in which the United States asserted a property interest in the bed of Lake Andes free from any beneficial interest of the Tribe.[1] The intervention motion was granted by the district court (Pet. App. 12-13), which then again entered judgment in favor of the Tribe (*id.* at 9-33).

Relying upon the judgments entered in two actions brought by the Tribe against the United States pursuant to the Indian Claims Commission

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[1] The United States did not request any determination of the status of its interests vis-a-vis those of the State, nor has the State ever requested any such determination Hence, the question whether the State or the United States has the better claim to the lakebed is not at issue in this case.

Act, ch. 959, 60 Stat. 1049, 25 U.S.C. (1976 ed.) 70 *et seq.*, in which the Tribe had recovered awards relating to the lands that it ceded in the 1858 Treaty and the 1892 Cession Agreement, the court first held that the United States was barred by the doctrine of collateral estoppel from contesting the Tribe's claim of aboriginal title to the lakebed as of 1859 (Pet. App. 15-18). The court further held that the Tribe's title to the lakebed had not been extinguished by events other than the 1858 Treaty or the 1892 Cession Agreement, including the United States' establishment and maintenance of the Wildlife Refuge, and that the Tribe had not voluntarily abandoned its beneficial ownership of the lakebed (Pet. App. 18-26). On these grounds, the court concluded that "[t]he Yankton Sioux Tribe of Indians owns the bed of Lake Andes" (*id.* at 33).

5. The State, the County and the United States appealed. The State and County argued that the State had acquired unencumbered title to the lakebed under the Equal Footing Doctrine upon South Dakota's admission to the Union and, in the alternative, that any interest that the Tribe might have had in the lakebed was extinguished by the 1892 Cession Agreement. Although the United States had supported the State's Equal Footing Doctrine argument in district court, it did not renew that argument on appeal.[2] Instead, the United States contended that

[2] The United States urged that the case instead should be resolved on the "narrow ground" that the 1892 Cession

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the 1892 Cession Agreement had extinguished any interest the Tribe might have had in the lakebed and that the United States was not collaterally estopped from challenging the Tribe's claims of ownership.

The court of appeals reversed (Pet. App. 1-8). The court held that, under the Equal Footing Doctrine, the United States, upon acquiring the Louisiana Territory, immediately began to hold lands underlying navigable waters within the acquired territory, including Lake Andes, in trust for future States (Pet. App. 4-5). The court found that the Tribe's aboriginal title in the area did not attach until after it was acquired by the Louisiana Purchase (*id.* at 7), and it held that such a claim of aboriginal title arising after the United States acquired the territory in question cannot defeat the State's title. In the court's words: "Even assuming that aboriginal title can ever attach to the bed of navigable waters, we hold that when sovereign title is in place and operation of the equal footing doctrine begins before any claim of aboriginal title has ripened, the state's claim of ownership is preeminent unless a recognized exception to the equal footing doctrine is applicable" (*id.* at 7). Finding

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Agreement extinguished any interest the Tribe might have had The United States further stated: "[W]e note that the Equal Footing Doctrine argument is one that is most appropriately raised by a state itself, rather than by the United States, and that the State of South Dakota is in fact ably making that argument in its own appeal. Hence, there is no need here for the United States to repeat that same argument on its own behalf" U S Br 22 n 14.

no conveyance of the lakebed to the Tribe that was either "explicit or clearly inferrable from the circumstances" (*ibid.*, citing *Montana* v. *United States*, 450 U.S. 544, 551-552 (1981), and *United States* v. *Holt State Bank*, 270 U.S. 49, 54-55 (1926)), the court concluded that the lakebed passed to the State of South Dakota in 1889 under the Equal Footing Doctrine (Pet. App. 7-8). The court therefore found it unnecessary to address any of the other issues presented (*id.* at 8).

ARGUMENT

The court of appeals' conclusion that the Yankton Sioux Tribe holds no present ownership interest in the bed of Lake Andes is correct, and its decision presents no question of general importance warranting review by this Court.

1. The United States has managed Lake Andes as the principal component of the Lake Andes National Wildlife Refuge for almost 50 years. In the court of appeals, the appellants made two independent arguments concerning ownership of the bed of Lake Andes, either of which would fully sustain the United States' right to continue to manage the Lake and its bed as part of the Refuge and would, correspondingly, defeat the Yankton Sioux Tribe's claim of aboriginal title to the lakebed.

First, the United States and the State argued that the Tribe had ceded any interest it had in the lakebed to the United States in the 1892 Cession

Agreement. That Agreement necessarily conferred on the United States, at least as against the Tribe, the right to exercise complete control over the lakebed for wildlife conservation or other purposes. Second, the State argued that the Tribe did not have aboriginal title to the lands prior to the Louisiana Purchase in 1803; that after 1803, the United States held the bed in trust, to be conveyed to the future State of South Dakota under the Equal Footing Doctrine; and that aboriginal title could not attach during this period in a manner that would defeat the State's claim under the Equal Footing Doctrine after statehood. Because the State thereafter granted the United States a permanent easement to enable it to maintain Lake Andes as part of a wildlife refuge, the United States succeeded to any interests the State acquired under the Equal Footing Doctrine to the extent necessary to assert control over the lakebed for refuge purposes. Accordingly, under this second argument as well, the Tribe's claim of aboriginal ownership would be defeated.

The United States did not rely in the court of appeals on the second rationale just discussed, but the court of appeals nevertheless adopted it. See pages 6-7 and note 2, *supra*.[3] This rationale presents

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[3] The court of appeals determined as a factual matter that the Tribe's exclusive occupancy of the area did not begin until after the Louisiana Purchase in 1803 (Pet. App. 6-7). That fact-bound holding does not warrant review by this Court. In any event, the Tribe concedes that "[t]he United States acquired

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novel theoretical issues regarding the interrelationship between a State's rights under the Equal Footing Doctrine and a tribe's claim of aboriginal title that attached to the same submerged land after the United States acquired the territory. Petitioner Yankton Sioux Tribe appears to acknowledge that its aboriginal claim, whenever it attached, would not actually defeat the State's *fee title* to the lakebed under the Equal Footing Doctrine, and that the Tribe therefore would have no more than the traditional aboriginal right to use or occupy the lakebed until that right was extinguished by the United States. See Pet. 6-8. Accordingly, as the Tribe suggests (Pet. 7), it might be legally possible for the courts to recognize both the Tribe's aboriginal claim and the State's fee-title claim to the same lakebed.

It might also be that the Tribe is correct that an absolute rule that aboriginal rights can *never* attach to lands underlying navigable waters after the United States acquired the territory would go too far. Thus, we may assume for present purposes that if a tribe moved into a new area on the public domain, the tribe, after the passage of an appropriate period, might be held to have acquired a new homeland on the public domain. By the same token, the United States might be held to have sufficiently acknowledged that new home by some official act. In that

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sovereign title to the area in 1803 before the Tribe's use of the area had ripened into aboriginal title" (Pet. 5 n. 2).

event, it would not be unreasonable to conclude that some or all of the tribe's aboriginal rights had been effectively transferred to the new location. And in appropriate circumstances, it is possible that this aboriginal right in turn might extend in some meassure to a navigable body of water and its underlying bed – at least if the water body was sufficiently central to the tribe's way of life at the new location and was regarded as such by responsible federal officials. Cf. *Montana* v. *United States*, 450 U.S. at 556. Even then, however, it would be necessary to reconcile the respective interests of the tribe and the State in order to define the nature and extent of such aboriginal rights, if any, that were thus acquired and that were later retained by the tribe when the fee title to the bed itself passed to the State upon its admission to the Union.

There is, however, no need for the Court to address these difficult theoretical and factual issues in this case. Questions concerning the recognition of aboriginal rights in lands underlying navigable waters have arisen only rarely in the lower courts. Moreover, as the State argues (Br. in Opp. 7-8), and as the Tribe concedes (Pet. 7-8 nn. 4-5), the Eighth Circuit's treatment of those issues in this case does not directly conflict with the appellate decisions petitioner cites (Pet. 7-8) – *Turtle Mountain Band of Chippewa Indians* v. *United States*, 490 F.2d 935 (Ct. Cl. 1974); *United States* v. *Romaine*, 255 F. 253 (1919); and *Heckman* v. *Sutter*, 119 F. 83 (1902) – because the question whether aboriginal title ripened

after the United States acquired the territory was not actually litigated in those cases. See also *United States* v. *Pend Oreille Cty. Pub. Util. Dist. No. 1*, 585 F. Supp. 606, 608 (W.D. Wash. 1984), quoted at Pet. 12 ("The courts have never squarely addresed the question of the competing claims to the same navigable waters by an Indian tribe and a state, where the Indian claim is based on aboriginal title."). Finally, we submit that resolution of the issues the Eighth Circuit chose to address is unnecessary to the outcome of this case, because, as we explain below, the United States' right to control Lake Andes and its bed, to the exclusion of the Yankton Sioux Tribe, is in any event secured by the 1892 Cession Agreement.

2. a. Article I of the 1892 Cession Agreement states that the Indians "hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to *all the unalloted lands* within the limits of the reservation set apart to said Indians [by the 1858 Treaty]" (28 Stat. 314 (emphasis added)). The bed of Lake Andes, of course, consisted entirely of unallotted lands. Hence, under the plain language of Article I, whatever interest the Tribe might once have had in the lakebed passed from the Tribe to the United States in 1892. Several considerations reinforce the conclusion that the explicit text of Article I should be given its natural effect of defeating any continuing claim of title by the Tribe.

First, Article I is framed in terms that this Court has repeatedly characterized as "express language of cession." *Oregon Dep't of Fish & Wildlife* v. *Klamath*

Indian Tribe, No. 83-2148 (July 2, 1985), Slip op. 15 n.19; *Solem* v. *Bartlett*, 465 U.S. 463, 469 (1984). In *DeCoteau* v. *District County Court*, 420 U.S. 425, 445 (1975) (emphasis added), this Court, in considering a similar and contemporaneous cession agreement, found that the same language was "precisely suited" to the purpose of conveying to the United States, "for a sum certain, *all* of [the Indians'] interest in *all* of their unallotted lands."

Second, the retention of the lakebed by the Tribe would have been inconsistent with the purposes of the 1892 Cession Agreement. Those purposes consisted not only of opening additional lands for non-Indian settlement, but also of paving the way for the anticipated end of the tribal way of life. As this Court stated in *Solem* v. *Bartlett* (465 U.S. at 468 (footnote omitted)):

> Another reason why Congress did not concern itself with the effect of surplus land acts on reservation boundaries was the turn-of-the-century assumption that Indian reservations were a thing of the past. Consistent with prevailing wisdom, members of Congress voting on the surplus land acts believed that within a short time – within a generation at most – the Indian tribes would enter traditional American society and the reservation system would cease to exist.

Finally, there is nothing in the extensive legislative history of the 1892 Cession Agreement to indicate that the parties intended that the Tribe would retain

any ownership interest in the bed of Lake Andes. See S. Rep. 196, 53d Cong., 2d Sess. (1894); H.R. Rep. 570, 53d Cong., 2d Sess. (1894); S. Misc. Doc. 134, 53d Cong., 2d Sess. (1894). If such an exception had been intended, it is reasonable to expect some mention of that fact in the account of the negotiations contained in the legislative history.

b. The Tribe cites (Pet. 9-10) several post-1892 statutes that it believes support the contention that it owns the lakebed. Those statutes, however, do not support the Tribe's position. In 1896 and 1906, Congress passed two measures appropriating funds for the purpose of enabling the Secretary of the Interior to "put down an artesian well or wells at or near Lake Andes, on the Yankton Indian Reservation * * * for the purposes of supplying said Indians with water for domestic purposes, for stock, and for irrigation purposes" (Indian Appropriations Act of 1896, ch. 398, 29 Stat. 343; Indian Appropriations Act of 1906, ch. 3504, 34 Stat. 371). It is apparent from the text of the Acts that their purpose was to provide a source of water for Indian allotments located upland of Lake Andes. Hence, those statutes shed no light on the question of the ownership or use of lands underlying the Lake itself.

Thereafter, in 1922, Congress enacted a statute authorizing the Commissioner of Indian Affairs to construct and maintain a spillway to stabilize the Lake's maximum elevation. Act of Sept. 21, 1922, ch. 358, 42 Stat. 990. The legislative history of this provision shows that its purpose was to prevent the

flooding of adjacent farmlands, including lands "held by Indians under Government restrictions," from the rising waters of Lake Andes. See H.R. Rep. 1073, 67th Cong., 2d Sess. (1922). The 1922 Act thus likewise does not suggest that the Tribe retains aboriginal ownership of the bed of Lake Andes.

3. For the foregoing reasons, it is clear that the 1892 Cession Agreement terminated any ownership interest that the Tribe then had in the bed of Lake Andes.[4] Accordingly, even if the tribe once had an

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[4] The district court found that the United States was precluded by collateral estoppel "from litigating the issues of aboriginal title and the Cession Agreement of 1892" (Pet. App. 15-16). The district court relied upon the judgments entered in two Indian Claims Commission proceedings in which the Yankton Sioux Tribe recovered awards relating to the lands that it had ceded in the 1858 Treaty and the 1892 Cession Agreement (*id.* at 16-17).

Plainly, however, neither of the two Commission judgments barred the United States from challenging the Tribe's ownership of the lakebed in this case. The action regarding lands ceded by the 1858 Treaty, Yankton *Sioux Tribe* v. *United States*, 24 Ind. Cl. Comm. 208 (Docket No. 332-C), aff'd, *Sioux Tribe* v. *United States*, 500 F.2d 458 (Ct. Cl. 1974), was based on a claim for compensation only for lands outside of the exterior boundaries of the reservation established by that Treaty. Because Lake Andes was within the reservation boundaries, the lakebed was not at issue in that action. The second Commission judgment, entered in *Yankton Sioux Tribe* v. *United States*, aff'd, *Yankton Sioux Tribe* v. *United States*, 623 F.2d 159 (Ct. Cl. 1980) (Docket No. 332-D), involved a claim seeking compensation for lands ceded under the 1892 Cession Agreement. However, as the Tribe conceded below (Br. 32), it specifically framed its claim so as to *exclude* the bed of Lake Andes. See 623 F.2d at 183; Pet. App. 17. As a result, no question concerning the lakebed was placed

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interest in the lakebed that survived South Dakota's admission to the Union in 1889, any such interest was promptly extinguished in 1892. Accordingly, the judgment of the court of appeals, which rejects the Tribe's claim of a *present* ownership interest in the lakebed, is clearly correct. The decision below therefore does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

DAVID C. SHILTON
ROBERT L. KLARQUIST
Attorneys

MAY 1987

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in issue in that case. In any event, collateral estoppel would not bar the State from asserting an interest in the lakebed, since the State was not a party to the proceedings before the Indian Claims Commission

In the Supreme Court of the United States
OCTOBER TERM, 1996

No. 96-1581

STATE OF SOUTH DAKOTA, PETITIONER,

v.

YANKTON SIOUX TRIBE AND DARRELL E. DRAPEAU

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case concerns the boundaries of the Yankton Sioux Indian Reservation. Those boundaries affect the United States' law enforcement authority under the Indian Major Crimes Act, 18 U.S.C. 1153, and other federal statutes that apply only in Indian country. In addition, the United States, because of its special relationship with the Indian Tribes, has a strong interest in protecting the integrity of reservation boundaries and in promoting tribal self-government within those boundaries.

STATEMENT

1. a. In the Treaty of April 19, 1858, 11 Stat. 743 (the 1858 Treaty), the Yankton Sioux Tribe ceded to the United States its aboriginal lands, about 11 million acres, except for a 430,000-acre Reservation in Charles Mix County in southeastern South Dakota. Art. 1 (Pet. App. 100). The Treaty specifically delineated the boundaries of the Reservation, which was said to consist of "four hundred thousand acres." *Ibid.*[1] In return, the United States agreed, among other things, "[t]o protect the * * * Yanctons in the quiet and peaceable possession of the said tract * * * so reserved for their future home." Art. 4 (Pet. App. 102). The Treaty further provided that "[n]o white person," with some exceptions, "shall be permitted to reside or make any settlement upon any part of the tract herein reserved for said Indians." Art. 10 (Pet. App. 108).

b. Toward the end of the 19th century, Congress began to question the policy, reflected in the 1858 Treaty, of setting aside large tracts of land as permanent homes for Indian Tribes. See *Solem* v. *Bartlett,* 465 U.S. 463, 466 (1984); *DeCoteau* v. *District County Court,* 420 U.S. 425, 431 (1975). Congress was faced at that time with a "continuing demand for new lands for the waves of homesteaders moving west," *Solem,* 465 U.S. at 466, but was constrained

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[1] A subsequent survey determined that the Reservation actually encompassed some 430,000 acres. See Pet App. 69.

by treaty provisions that, like Article 10 of the 1858 Treaty, prohibited white settlement on Indian reservations. In addition, Congress believed that the Indians would benefit from "assimilation into American society," which would be accelerated by their "abandon[ing] their nomadic lives on the communal reservations and settling] into an agrarian economy on privately owned parcels of land." *Ibid.*

In response to those concerns, Congress passed the General Allotment Act, commonly known as the Dawes Act, in 1887. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388. The Dawes Act "empowered the President to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers, with the proceeds of these sales being dedicated to the Indians' benefit." *DeCoteau,* 420 U.S. at 432. As this Court has recognized, while the elimination of Indian reservations may have been Congress's ultimate goal, the actual consequence of allotment was often "to continue the reservation system," at least for the time being. *Mattz* v. *Arnett,* 412 U.S. 481, 496 (1973).

c. By 1892, much of the Yankton Sioux Reservation had been allotted to individual members of the Tribe pursuant to the Dawes Act. Pet. App. 71. In that year, Congress appropriated funds for the Secretary of the Interior "to negotiate with any Indians for the surrender of portions of their respective reservations, any agreement thus negotiated being subject to subsequent ratification by Congress." Act of July 13, 1892, ch. 164, § 1, 27 Stat. 137. The Secretary

appointed three commissioners to conduct such negotiations with the Yankton Sioux. Pet. App. 71.

The Commissioner of Indian Affairs in the Department of the Interior instructed the commissioners to attempt to acquire all, or at least some portion, of the Tribe's surplus lands on terms that "should be just and equitable to the Indians as well as the United States." J.A. 99. The commissioners were provided with a form of agreement as "an indication of the views" of the Office of Indian Affairs, but were "not required to adhere to [it] absolutely." J.A. 101 (emphasis omitted).

In an agreement dated December 31, 1892 (the 1892 Agreement), the Tribe ceded to the United States, for $600,000, all of its surplus lands. Arts. I & II (Pet. App. 112-113). As the commissioners noted in their report to the Secretary of the Interior, those lands were "not in one body, but scattered over the reservation and mixed up with the allotted lands of the Indians." J.A. 137.[2] The Agreement reserved from

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[2] The form agreement, which we have lodged with the Clerk of the Court, did not propose to pay the Tribe a sum certain for its lands. Instead, the lands were to be appraised and offered for sale in 160-acre parcels at no less than a specified price per acre. The provision paying the Tribe a flat $600,000 for the lands appears to have been adopted for administrative convenience. The commissioners explained that the appraisal option "would accomplish only about one-third of the work which the Government and the Indians desired to accomplish by this transaction," because only the most desirable land would have sold at or above the minimum price then agreeable to the Tribe. J.A. 136.

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sale to settlers those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes * * * until they are no longer required for such purposes." Art. VIII (Pet. App. 116).

The Agreement, unlike the Office of Indian Affairs form, contained a savings provision, which expressly preserved the Tribe's rights under the 1858 Treaty that created the Reservation:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

Art. XVIII (Pet. App. 120).[3]

It then "would have been necessary to enter into a new agreement with [the Tribe], reducing the minimum price" when the land failed to sell. *Ibid.*

[3] In addition, the Agreement contained a provision, insisted upon by the Tribe, prohibiting the selling or giving away of "intoxicating liquors" upon "any of the lands by this agreement ceded and sold to the United States" or "any other lands within or comprising the reservations of the Yankton Sioux * * * as described in the [1858] treaty." Art. XVII (Pet. App. 120).

d. Congress "accepted, ratified, and confirmed" the Agreement without change and incorporated it, together with several other surplus land agreements, into an omnibus Indian appropriations act (the 1894 Act). Act of Aug. 15, 1894, ch. 290, § 12, 28 Stat. 319 (Pet. App. 122). The congressional ratification debates raised various concerns about the Agreement, including whether the purchase price was too high and whether the Indians should be paid only when, or if, the lands were sold to settlers. J.A. 381-382, 403-427, 437-444. But there was no discussion of whether the Agreement, if ratified, would alter the boundaries of the Reservation.[4]

e. On May 16, 1895, President Cleveland issued a proclamation declaring that "all of the lands acquired from the Yankton tribe" by the 1892 Agreement, aside from those reserved for agency, school, and other purposes, were "open to settlement, under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreement" and all applicable laws. J.A. 456. The proclamation incorporated a "Schedule of Lands within the Yankton Reservation, to be opened to settlement by Proclamation of the President." *Ibid.*

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[4] The Act also included various implementing provisions. See Pet. App. 122-124. Those included a requirement that the sixteenth and thirty-sixth sections of each township on the opened lands be "reserved for common-school purposes" and be "subject to the laws of the State of South Dakota." *Id.* at 123.

2. In 1993, the Southern Missouri Recycling and Waste Management District (the Waste District) purchased, from a non-Indian, a parcel of land within the original boundaries of the Yankton Sioux Reservation. Pet. App. 91. The Waste District sought to develop the land as a regional solid waste landfill. *Ibid.* After a hearing before the South Dakota Board of Minerals and Environment, at which the Tribe opposed the landfill, the Waste District obtained a permit for the project. *Id.* at 91-92.

The Tribe then commenced this suit to enjoin construction of the landfill. Petitioner State of South Dakota was joined as a third-party defendant. Pet. App. 93. After trial, the district court concluded that "Congress did not disestablish or diminish the boundaries of the Yankton Sioux Reservation when it ratified the 1892 Agreement with the Yankton Sioux Tribe." *Id.* at 96.[5]

The court of appeals affirmed. Pet. App. 1-65. The majority acknowledged that the provisions in Articles I and II of the Agreement providing for cession of surplus lands in return for a fixed payment might, in other circumstances, indicate congressional intent to diminish a reservation. *Id.* at 14-15. However, the totality of the 1894 Act's text and legislative history –

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[5] At the same time, the district court found that the Tribe had not demonstrated that it had regulatory authority over the landfill project. Pet. App. 96. The Tribe did not appeal that ruling. *Id.* at 6 n.5.

and, in particular, the savings provision of Article XVIII did not, in the majority's view, establish that Congress intended to diminish the Reservation. *Id.* at 21, 27, 43-44. The dissent argued that the "cession" and "sum certain" language of Articles I and II alone provided sufficient evidence of diminishment. *Id.* at 44.

SUMMARY OF ARGUMENT

Under the Court's surplus land act jurisprudence, only Congress can diminish an Indian reservation. Its intent to do so must appear in the text of the statute itself or be clear from the surrounding circumstances. A congressional intent to diminish is not found lightly, and any ambiguities must be resolved in favor of the Indians.

The text of the 1894 Act, read in light of those principles, does not evince a clear congressional intent to diminish the Yankton Sioux Reservation. To be sure, the Act and the Agreement that it ratified contain language of cession and lump sum payment that, without more, has been held sufficient to establish such intent in other cases. But there *is* more in this case. The savings provision contained in Article XVIII of the Agreement, and incorporated by Congress into the Act, declares that "all provisions" of the 1858 Treaty are to remain "in full force and effect." Article XVIII thus preserves the first Article of the Treaty, which sets forth the boundaries of the Reservation. At a minimum, the savings provision

manifests sufficient ambiguity as to Congress's intent regarding the reservation boundaries that the matter must be resolved in favor of the Tribe. That conclusion is reinforced by the provisions of the Agreement and the Act that reserve from sale to settlers those surplus lands occupied by the United States for agency, school, and other purposes; that reserve (but do not grant to the State) township sections for school purposes; and that prohibit the introduction of liquor onto the ceded lands or "any other lands within or comprising" the Reservation as delineated in the 1858 Treaty.

Nor do the course of negotiations with the Tribe, the debates on the 1894 Act, and other surrounding events provide the "unequivocal[ ]" evidence necessary to demonstrate "a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem* v. *Bartlett*, 465 U.S. 463, 471 (1984). Petitioner concedes as much. Pet. Br. 28-29. And tribal members have remained, to this day, a substantial portion of the population within the original reservation boundaries.

Finally, the subsequent treatment of the reservation lands has been "rife with contradictions and inconsistencies." *Solem*, 465 U.S. at 478. However, on two occasions, in 1913 and 1941, when the federal government considered the issue, it concluded that the Reservation was not diminished. The Court should reach the same conclusion here.

ARGUMENT

THE YANKTON SIOUX INDIAN RESERVATION HAS NOT BEEN DIMINISHED

This Court has recognized that each case involving whether a surplus land act has altered Indian reservation boundaries is unique, because "[t]he effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage." *Solem* v. *Bartlett*, 465 U.S. 463, 469 (1984). "[I]t is settled law that some surplus land Acts diminished reservations and other surplus land Acts did not," but instead "simply offered non-Indians the opportunity to purchase land within established reservation boundaries." *Id.* at 469, 470 (citations omitted); see *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586-587 (1977) ("The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status.").[6]

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[6] An Indian reservation does not imply total Indian or federal ownership or control of all of the lands within its boundaries. The term instead refers to the geographical area within which the Tribe's authority over its territory and its members is primary. *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973). It also describes an area in which the federal government exercises criminal jurisdiction in matters affecting Indians, see 18 U.S.C. 1151, and in which the services of the Bureau of Indian Affairs are focused. Reservation status does not eliminate all jurisdiction of the State with regard to non-Indians, especially in their relations with other non-Indians. See, *e.g.*,

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In a series of modern decisions concerning the effects of turn-of-the-century surplus land acts, the Court has followed several "well-established legal principles" in assessing whether such an act has diminished a reservation. *Rosebud Sioux,* 430 U.S. at 586-587; see, *e.g., Hagen* v. *Utah,* 510 U.S. 399, 410-411 (1994); *Solem,* 465 U.S. at 470-472; *Mattz* v. *Arnett,* 412 U.S. 481, 504-505 (1973). The "first and governing principle" is that, "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem,* 465 U.S. at 470. The dispositive question, then, is whether "Congress [has] clearly evince[d] an intent to change boundaries." *Ibid.* (internal quotation marks and ellipses omitted). Its intent to do so "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz,* 412 U.S. at 505. The "most probative evidence" of such intent is, of course, the actual language of the surplus land act. *Hagen,* 510 U.S. at 411; *Solem,* 465 U.S. at 470.

Second, while events surrounding the passage of a surplus land act are relevant, they rarely are sufficient, in themselves, to establish that Congress intended to alter reservation boundaries if the act

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Strate v. *A-1 Contractors,* 117 S. Ct. 1404 (1997), *United States* v. *McBratney,* 104 U.S. 621 (1881).

itself is silent or ambiguous. *Solem*, 465 U.S. at 471. It is only when such events "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation" that they can sustain an inference that "Congress shared the understanding that its action would diminish the reservation." *Ibid.*[7]

Third, the diminishment of an Indian reservation "will not be lightly inferred." *Solem*, 465 U.S. at 470; accord *Hagen*, 510 U.S. at 411. Any ambiguities in the surplus land act, its legislative history, or the surrounding context are to be resolved "in favor of the Indians." *Ibid.*; *Rosebud Sioux*, 430 U.S. at 586 ("[D]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."). Accordingly, absent "substantial and compelling evidence of a congressional intention to diminish Indian lands," the Court has considered itself "bound by [its] traditional solicitude for the Indian tribes to rule that diminishment did not take place." *Solem*, 465 U.S. at 472.

No such "substantial and compelling evidence" exists here. The text of the 1894 Act, the circumstances surrounding its enactment, and subsequent

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[7] Moreover, the Court has been "careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage." *Hagen*, 510 U.S. at 411. The latter shed far less light on the intent of the Congress that adopted the act

events do not demonstrate with the requisite clarity that Congress intended to diminish the Yankton Sioux Reservation.

A. The Savings Provision Of The 1892 Agreement And The 1894 Act Precludes Any Determination That Congress Clearly Intended To Diminish The Reservation

Nowhere in the 1894 Act, the underlying 1892 Agreement, or the records of the negotiations and congressional debates is there any express statement that the Reservation was to be "abolished," "discontinued," "vacated," or otherwise disestablished or diminished. Congress used such language in a number of contemporaneous statutes involving Indian reservations. See *Mattz,* 412 U.S. at 504 n.22 (citing such statutes). It chose not to do so here.

In the absence of such language, provisions in a surplus land act that accept a Tribe's "cession" of reservation lands in return for a sum certain, where unqualified by other provisions, have been held sufficient to create a strong presumption that Congress intended to diminish a reservation. See *Solem,* 465 U.S. at 470-471; *DeCoteau* v. *District County Court,* 420 U.S. 425, 445 (1975). But no such inference is warranted in a case such as this one, in which the ceded lands were scattered over the reservation (see J.A. 137) and Congress, in the same surplus land act, imposed conditions on the transaction that

reasonably may be read as preserving the existing reservation boundaries.

The savings provision in Article XVIII of the 1892 Agreement, which Congress incorporated verbatim into the 1894 Act, contains such conditions with respect to the Yankton Sioux Reservation. Article XVIII begins by expansively providing that "[n]othing in this agreement" – necessarily including the cession and lump sum payment provisions of Articles I and II – "shall be construed to abrogate the [1858] treaty." Pet. App. 120. It then further declares that, "after the signing of this agreement, and its ratification by Congress, all provisions of the [1858] treaty * * * shall be in full force and effect, the same as though this agreement had not been made." *Ibid.* No exception is made for the first Article of the 1858 Treaty, which created the Reservation and delineated its boundaries. *Id.* at 100; see also Treaty, Art. 4 (Pet. App. 103) (recognizing that the Reservation was to be the Tribe's "permanent" home). Nor is any exception made for the other provisions in the Treaty that contemplate tribal self-government within the reservation boundaries.[8]

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[8] For example, Article 11 of the Treaty recognizes the federal government's authority over "matters of dispute and difficulty between [the Tribe] and other Indians," and thus, by implication, the Tribe's authority over internal matters. Pet. App. 108-109. That same article contains the Tribe's agreement to assist in enforcing federal "treaties, laws, or regulations * * * within the limits of [the] reservation." *Id.* at 109. See *United States* v. *Wheeler*, 435 U.S. 313, 322 (1978) (law enforcement

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Article XVIII is considerably broader than the savings provisions contained in most other Indian agreements. See Pet. App. 16-18 & n.12, 81 (contrasting language of other agreements). It differs significantly from the more common savings provisions that simply preserve "benefits" or rights created under earlier treaties or agreements "*not inconsistent* with the provisions of this agreement." *Rosebud Sioux*, 430 U.S. at 623 (Marshall, J., dissenting) (quoting Rosebud Sioux agreement, Act of Apr. 23, 1904, ch. 1484, § 1, Art. V, 33 Stat. 255) (emphasis added); see *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 760-761 (1985) (quoting similar savings provision).[9]

Petitioner offers three reasons why Article XVIII should not be read to rebut any presumption created by the cession and lump sum payment language of

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authority over tribal members is an inherent aspect of tribal self-government)

[9] None of the other surplus land agreements ratified along with the 1892 Agreement contains a similar savings provision. The agreements with the Cour d'Alene, Alsea, and Yuma Indians contain no savings provision at all See Act of Aug. 15, 1894, ch. 290, §§ 14-15, 17, 28 Stat 322-326, 332-336 The agreement with the Nez Perce Indians contains a provision that preserves those portions of earlier treaties "not inconsistent with the provisions of this agreement" § 16, 28 Stat 331 A brief amicus curiae has been filed by Lewis County, Idaho, arguing that the Nez Perce agreement diminished that Tribe's Reservation. That issue is not before the Court or, indeed, before any court at this time.

Articles I and II. Pet. Br. 20-28. None of those arguments has merit.

First, petitioner contends (Br. 21-22) that Article XVIII should be construed solely "to preserve the annuities due the Tribe under the Treaty of 1858." But Article XVIII concludes with a separate clause specifically providing that "the said Yankton Indians shall continue to receive their annuities under the [1858] treaty." Pet. App. 120. Petitioner's proposed construction would render superfluous all of the preceding language of Article XVIII, in contravention of the canon that "[s]tatutes must be interpreted, if possible, to give each word some operative effect." *Walters* v. *Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660, 664 (1997); see *United States* v. *Alaska*, 117 S. Ct. 1888, 1918 (1997) ("The Court will avoid an interpretation of a statute that renders some words altogether redundant.") (internal quotation marks omitted).[10]

Second, petitioner contends (Br. 23-24) that Article XVIII, aside from its annuity clause, should be disregarded because it is "ambiguous" or "inconsistent." Principally, petitioner argues that Article XVIII's preservation of "all provisions" of the 1858 Treaty is inconsistent with Articles I and II, because

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[10] Moreover, while the historical materials cited by petitioner (Br. 21-23) demonstrate that some members of the Tribe were concerned at the time of the 1892 negotiations with the preservation of their annuities, they do not suggest that Article XVIII was drafted solely to address those concerns.

the 1858 Treaty gave the Tribe "possession" of all reservation lands whereas Articles I and II transfer possession of some of those lands to the United States. But the appropriate judicial response to tension between different provisions of the same statute is not to read one of those provisions out of the statute. This Court has stressed that "[s]tatutory construction is a holistic endeavor," which, "at a minimum, must account for a statute's full text." *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (internal quotation marks omitted); see *Federal Power Comm'n* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514 (1949) ("If possible, all sections of the Act must be reconciled so as to produce a symmetrical whole."). It is thus essential "to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section," *United States* v. *Menasche*, 358 U.S. 528, 538-539 (1955) (internal quotation marks omitted), as petitioner would do here.

The 1894 Act may readily be construed to give effect to Article XVIII as well as Articles I and II. As the court of appeals recognized, all three provisions may be reconciled by construing the Act as conveying certain real property within the Reservation to the United States, for subsequent sale to non-Indian settlers, while preserving "as much of [the 1858] treaty as possible." Pet. App. 20-21. In other words, the Agreement and the Act may reasonably be read as simply opening the surplus lands for settlement

"within established reservation boundaries," *Solem*, 465 U.S. at 470, while preserving those boundaries and the Tribe's right of self-government within them. The Agreement thus modifies only that portion of Article 10 of the 1858 Treaty that excluded white settlers from the Reservation.

We submit that ours is the most plausible "holistic" construction of the Act. But even if petitioner's strained construction, which essentially reads Article XVIII out of the Act, were deemed equally plausible, our construction must prevail. At a minimum, Article XVIII renders the Act sufficiently ambiguous that the diminishment question must be resolved in favor of the Tribe. See *Hagen*, 510 U.S. at 411; *Rosebud Sioux*, 430 U.S. at 586.

Finally, petitioner notes (Br. 26-28) that the Court did not accord significance to savings provisions in holding against diminishment in *Solem* or in favor of diminishment in *DeCoteau*. But the Court's silence is hardly surprising, given that neither the parties to those cases nor the United States as amicus curiae based their arguments on any savings provision. Nor did they have reason to do so. The surplus land act at issue in *DeCoteau* did not even contain a savings provision. See 420 U.S. at 455-460 (reprinting agreement as ratified). And the savings provision in *Solem*'s surplus land act was weaker than the one here. See Act of May 29, 1908, ch. 218, § 9, 35 Stat. 464 ("nothing in this Act shall be construed to deprive the said Indians * * * of any benefits to which they are entitled under existing treaties

or agreements not inconsistent with the provisions of this Act").[11] In any event, because each surplus land act case is *sui generis*, turning on the particular "language of the Act and the circumstances underlying its passage," *Solem*, 465 U.S. at 469, no conclusion could properly be drawn from the Court's failure to address a different savings provision in a different surplus land act passed under different circumstances.

B. Other Provisions Of The 1894 Act Do Not Evince A Congressional Intent To Diminish The Reservation

Other provisions of the 1892 Agreement and the 1894 Act reinforce the conclusion, drawn from the savings provision of Article XVIII, that Congress did not clearly manifest an intent to diminish or disestablish the Reservation.

1. *The "agency, schools, and other purposes" provision.* Article VIII of the Agreement reserved from sale to settlers those surplus lands "as may now

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[11] Petitioner also notes (Br. 26-27) that the Court observed in *Montana* v. *United States*, 450 U.S. 544, 548 (1981), that a series of surplus land acts had "reduced" the Crow Reservation. Although not mentioned by the Court, two of those acts contained savings provisions: Act of Mar. 3, 1891, ch. 543, § 31, 26 Stat. 1042; Act of Apr. 11, 1882, ch. 74, § 1, 22 Stat. 43. However, given that the construction of the surplus land acts was not at issue in *Montana*, the Court's statement has no relevance here.

be occupied by the United States for agency, schools, and other purposes * * * until they are no longer required for such purposes." Pet. App. 116. The Court viewed a virtually identical provision in *Solem* as "strongly suggest[ing]" that Congress did not intend to diminish the reservation, because "[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened areas would remain part of the reservation." 465 U.S. at 474. The same is true here.

2. *The "school sections" provision.* The 1894 Act contains a provision (not contained in the underlying 1892 Agreement) excepting from sale to settlers "the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota." Pet. App. 123. Petitioner notes that a provision in the surplus land act in *Rosebud Sioux*, which "grant[ed]" the sixteenth and thirty-sixth sections to South Dakota for common schools, was held to indicate diminishment. See 430 U.S. at 600-602. But the Court's rationale in *Rosebud Sioux* is inapplicable here.

As the Court noted in *Rosebud Sioux*, the enabling act admitting South Dakota to the Union provided that the sixteenth and thirty-sixth sections of each township "are hereby granted to [the] State[] for the support of common schools." 430 U.S. at 599 (quoting Act of Feb. 22, 1889, ch. 180, § 10, 25 Stat. 679). That act further provided, however, that when those sections were "embraced in permanent [Indian]

reservations," they "shall not, at any time, be subject to the grants * * * until the reservation shall have been extinguished." *Id.* at 599-600 (quoting § 10, 25 Stat. 679). The Court relied primarily on the legislative history of the *Rosebud Sioux* surplus land act to conclude that its school sections provision was intended to implement the school sections provision of the enabling act, and thus that the surplus land act extinguished the reservation status of the land so as to trigger the grant in the enabling act. See *id.* at 600-601 (quoting statement in congressional reports that school sections provision "is in conformity with the guarantee given to the State of South Dakota by Congress in the enabling act"). No such legislative history exists here.

Nor does the 1894 Act contain the express "grant" language of the *Rosebud Sioux* surplus land act that was held to have implemented the South Dakota enabling act. To the contrary, the 1894 Act simply "reserve[s]" the sixteenth and thirty-sixth sections from settlement without taking the further step of granting them to the State, as contemplated by the enabling act when an Indian reservation is extinguished. Indeed, if the school sections were granted to the State and the Reservation extinguished, there would have been no need for Congress to provide, as it did in the same clause of the 1894 Act, that those sections "shall * * * be subject to the laws of the State of South Dakota." Pet. App. 123. Accordingly, the most natural reading of the school sections provision is that it simply authorizes the State to operate

common schools for Indian and non-Indian students on specified lands within the reservation boundaries. At the very least, petitioner errs in contending that the school sections provision affirmatively supports a finding of diminishment. See *DeCoteau*, 420 U.S. at 445-446 n.33 (discussing similar provision).

3. *The liquor prohibition.* The Agreement and the Act also contain a provision that "[n]o intoxicating liquors * * * shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux * * * as described in the [1858] treaty." Art. XVII (Pet. App. 120). Petitioner notes that the Court held that a liquor prohibition in the *Rosebud Sioux* surplus land act indicated diminishment of the reservation. See 430 U.S. at 613-614. The Court reasoned that Congress must have assumed that the opened lands would no longer be Indian country, and thereby subject to the existing statute prohibiting liquor in Indian country, because otherwise the provision would have been mere surplusage.

There is, however, an equally plausible explanation for why Congress would have included such a provision in the 1894 Act without intending to diminish the Reservation. The term "Indian country," which was not statutorily defined in 1894, was understood to exclude all lands held by non-Indians, even if located within reservation boundaries. See *Solem*,

465 U.S. at 468.[12] It was thus uncertain whether such lands would continue to be covered by the general statute banning liquor in Indian country. Special provisions like that contained in the 1894 Act eliminated any such uncertainty.

It is noteworthy as well that the liquor prohibition in the 1894 Act applies not to the opened lands alone, but to *all* lands within the original reservation boundaries, including lands held by the Tribe that indisputably would remain subject to the general statute banning liquor in Indian country. Congress thus appears to have been concerned simply with

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[12] The term "Indian country," currently defined in 18 U.S.C. 1151, can be traced back to early statutes regulating Indian affairs. In the Indian Intercourse Act of 1834, Congress designated as Indian country all land west of the Mississippi River, not including Missouri, Louisiana, and the Arkansas Territory, and all land east of the Mississippi that was not part of any State, "to which the Indian title has not been extinguished." Ch. 161, § 1, 4 Stat. 729. Changing historical circumstances rendered that definition obsolete. In 1874, the compilers of the Revised Statutes omitted any statutory definition of Indian country, while leaving intact the numerous statutory provisions that used that term. From 1874 to 1948, the task of defining Indian country was left to the judiciary. In the early part of this century, the Court issued a series of decisions that form the basis for Section 1151. See 18 U.S.C. 1151 note. Thus, Section 1151 was, in part, an outgrowth of *Donnelly* v. *United States*, 228 U.S. 243 (1913), which eliminated the requirement that Indian country "be confined to land formerly held by the Indians, and to which their title remains unextinguished." *Id.* at 269. "Only in 1948," with the enactment of Section 1151, "did Congress uncouple reservation status from Indian ownership." *Solem*, 465 U.S. at 468.

adopting a clear, specific, and *permanent* ban on the selling or giving away of liquor anywhere within the Reservation.[13]

Significantly, moreover, because the Act prohibits liquor on "the lands by this agreement ceded and sold to the United States" as well as "any *other* lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the [1858] treaty" (Pet. App. 120) (emphasis added), the Act appears to contemplate that the ceded lands would remain "within" the Reservation. The liquor provision in *Rosebud Sioux* contained no such description of the surplus lands as being within the reservation.

Petitioner apparently reads the liquor prohibition's reference to the 1858 Treaty as simply an identification of which lands were subject to the prohibition, not as an indication that all such lands would retain their reservation status. But that is not the most natural reading. It is further undermined by the background of the liquor prohibition, which was included in the 1892 Agreement only because the Tribe had "demand[ed]" it. J.A. 154-155.[14] The

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[13] The 25-year liquor prohibition in *Rosebud Sioux* similarly applied to "lands allotted" and "those retained or reserved," as well as to "the surplus land sold, set aside for town-site purposes, granted to the State of South Dakota, or other wise disposed of." Act of May 30, 1910, ch 260, § 10, 36 Stat 451.

[14] That was not the case with the liquor prohibition included 16 years later in the *Rosebud Sioux* surplus land act. See 430 U S. at 611 (provision recommended by Secretary of Interior).

commissioners explained that the Tribe had made it an "imperative condition" of the sale of its surplus lands "that whisky should be excluded," because the Tribe "fear[ed] that upon the opening of the Yankton Reservation to settlement by white people, drinking saloons would be established in their midst." J.A. 154. That account conveys a clear sense that the Tribe believed that the Reservation would retain its identity and Indian character. The commissioners endorsed the Tribe's condition in terms that reinforce that understanding: they expressed the "hope that Congress will fix a penalty for the violation of this provision which will make it most effective in preventing the introduction of intoxicants *within the limits of the reservation*." J.A. 154-155 (emphasis added).[15]

Thus, far from supporting a finding of congressional intent to diminish the Reservation, as petitioner asserts, the liquor prohibition, like the school sections provision, affirmatively supports a contrary finding. But even if the school sections and liquor provisions were the same as those in *Rosebud Sioux*, the Court has since made clear that such provisions are "suspect" as "independent evidence of a congressional intention to diminish." *Solem*, 465 U.S. at 475 n.18.

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[15] Congress responded by including penalties for the introduction of liquor "upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation as created by the [1858] treaty." Pet. App. 124

C. Events Surrounding The 1894 Act Do Not Evince A Congressional Intent To Diminish The Reservation

The events surrounding the negotiation of the 1892 Agreement and the adoption of the 1894 Act do not demonstrate the requisite clear intent to diminish the Yankton Sioux Reservation. *Mattz*, 412 U.S. at 505. Indeed, petitioner essentially concedes (Br. 28) that such intent could not be established based on contemporaneous events alone.

1. *The 1892 negotiations.* The record of the negotiations with the Yankton Sioux contains none of the sorts of statements by federal negotiators or tribal members that, in other cases, have been found to reflect a widely held understanding that a reservation was to be diminished. In *Rosebud Sioux*, for example, the Court noted the federal negotiator's statement to the Tribe that its cession of certain lands "will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge Reservation." 430 U.S. at 591-592. Similarly, the Court noted in *Hagen* that the federal negotiator had informed the Tribe that "after next year there will be no outside boundary line to this reservation." 510 U.S. at 417. And in *DeCoteau*, the Court noted a tribal spokesman's acknowledgment that the reservation "was given us as a permanent home, but now we have decided to sell." 420 U.S. at 436-437 n.16.

No similar understanding that the Yankton Sioux Reservation was to be diminished can be discerned from the statements cited by petitioner. See Pet. Br. 29-30. Commissioner Cole's assertions that "[t]he reservation alone proclaims the old time and the old conditions," and that "[t]he tide of civilization * * * requires the sale of these surplus lands and the opening of this reservation to white settlement," are fully consistent with an intent to open surplus lands to non-Indian settlement within existing reservation boundaries. Commissioner Brown's statement that "[t]he time is past when you could stay in your present condition" likewise does not suggest any immediate extinguishment of the Reservation. He may simply have been expressing the view that the Tribe must have greater contact with non-Indian society in order to achieve the goal of self-sufficiency contemplated by the 1858 Treaty. Nor does the recognition by the commissioners and tribal members that the Agreement would effect a "sale" of surplus lands (see Pet. Br. 29) suggest any understanding that the reservation boundaries would thereby be altered.

Other contemporaneous statements suggest, if anything, that the commissioners and the Tribe did *not* understand that the Reservation would be diminished. In their final report to the Secretary of the Interior, for example, the commissioners observed that the Agreement would bring about "[t]he settlement *of the reservation* by white people." J.A. 150 (emphasis added). And in a letter to one of the commissioners shortly after the Agreement was signed,

Reverend Williamson, a missionary who was well-regarded among the Yankton Sioux, found "no cause of apprehension that this agreement will *in any way* interfere with the treaty of 1858." J.A. 317-318 (emphasis added).

2. *The congressional debates.* The congressional debates on the 1894 Act fail to demonstrate any intent to diminish the Reservation. The discussions focused primarily on the fiscal consequences of the government's agreeing to pay a sum certain for the surplus land at the outset rather than to pay only when, or if, the land was sold to settlers. See J.A. 406-427, 437-444. As Representative Pickler of South Dakota, a member of the Indian Affairs Committee and a supporter of the Agreement, stated during the House debates:

> The only question is whether we will settle up with the Indians now or keep books with them and pay them hereafter as the lands are sold, supposing they would so agree.

J.A. 427; see J.A. 432 (Rep. Maddox, an opponent of ratification, agrees that "[t]he question is whether we are willing to advance the money"). Nothing in the record indicates that Congress believed that the answer to that question would affect the future boundaries of the Reservation. See Pet. App. 15-16 ("the House debate" and other contemporaneous statements "all show that a sum certain price was included for reasons other than issues of jurisdiction and sovereignty").

Petitioner identifies no statement during the congressional debates that expressly addresses the status of the reservation boundaries. Instead, petitioner relies (Br. 31-32) on statements by two Representatives that the opened lands would become part of the "public domain." See J.A. 380, 386 (Reps. McRae and Hermann). However, isolated floor statements referring to the "public domain," especially when no such references appear in the text of the Act itself, shed little light on the diminishment question. See *Solem*, 465 U.S. at 475 & n.17; see also *Hagen*, 510 U.S. at 413.[16]

3. *The Presidential proclamation.* The post-enactment proclamation of the President opening the surplus lands for settlement also indicates that those lands were to remain within the Reservation. The proclamation refers to, and incorporates by reference, a "Schedule of Lands *within the Yankton Reservation,* South Dakota, to be opened to settlement by Proclamation of the President." J.A. 456 (emphasis added). The proclamation further states that the lands were being opened "under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in [the 1892] agreement." *Ibid.* Those "restrictions" and "reservations" necessarily included the Article XVIII savings

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[16] Moreover, another member of Congress expressed the view that the opened lands would "[n]ot necessarily" become a part of the "public domain" upon their purchase by the United States. J.A. 382-383 (statement of Rep. Lynch).

provision preserving the "full force and effect" of the 1858 Treaty establishing the Reservation.

D. Subsequent Events Do Not Establish That The Reservation Was Diminished

The Court has recognized that evidence of the government's subsequent treatment of the lands opened by a surplus land act is of only limited value in assessing whether Congress intended to diminish a reservation. *Solem*, 465 U.S. at 471. It has never been found sufficient, in itself, to establish such an intent. Moreover, where the treatment of the opened lands has been "rife with contradictions and inconsistencies," such evidence is "of no help." *Id.* at 478; see also *Hagen*, 510 U.S. at 420.

The federal government's conduct with respect to the Yankton Sioux Reservation, while not entirely consistent, suggests that no diminishment was intended. Most significantly, on two occasions when the federal government squarely considered the question, it concluded that the Reservation was not diminished.

First, as early as 1913, in its brief in *Perrin* v. *United States*, 232 U.S. 478 (1914), the United States took the position that the Reservation had not been diminished. In arguing the validity of the liquor prohibition contained in Article XVII of the 1892 Agreement, the United States stated:

> And the "Reservation" referred to in Article I [of the Agreement] (as enduring then and after the passage of the act) was necessarily

> that embraced in the original boundaries of the 400,000 acres [under the 1858 Treaty].

U.S. Br. at 7-8, *Perrin* v. *United States*, No. 707 (O.T. 1913). In other words, the Reservation not only "endur[ed]" after the 1894 Act, but continued to encompass all of the lands within the 1858 Treaty boundaries. See also *id.* at 19-20 (describing ceded lands as within "actual physical boundaries of the reservation"). The petitioner took the same position. See *Perrin* Transcript of Record at 28.

Second, in 1941, Felix Cohen, then-acting Solicitor of the Department of the Interior and author of the authoritative *Handbook of Federal Indian Law* (1942), issued a carefully considered opinion letter concluding that the boundaries of the Yankton Sioux Reservation had not been changed by the 1894 Act. See 1 U.S. Dep't of Interior, *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs* 1063 (1979). His conclusion rested primarily on the fact that the 1894 Act, in contrast to other surplus land acts, provided for the allotment to tribal members of lands "scattered over all the reservation," rather than "ced[ing] a definite part of the reservation and treat[ing] the remaining area as a diminished reservation." *Id.* at 1064. Solicitor Cohen noted (*ibid.*) that events since the passage of the Act had not undermined his conclusion that the Reservation had not been diminished:

> Since the 1892 agreement there has been no redefinition by Congress of the Yankton Reservation nor determination that the

> reservation no longer exists. On the contrary, the reservation was referred to as a still existing unit in the acts of April 29, 1920 (41 Stat. 1468), and June 11, 1932 (47 Stat. 300).[17]

We do not dispute that Congress, the Executive, and the federal courts may not always have been consistent in their statements with respect to the status of the Yankton Sioux Reservation. Congress, for example, has occasionally used the term "former" in its post-1894 references to the Reservation. See Pet. Br. 44. More often, however, it has not.[18] While

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[17] Petitioner argues (Br. 42-44) that Acting Solicitor Cohen's opinion is inconsistent with opinions issued by other members of the same office. Those opinions, however, either assume diminishment without analysis (see J.A. 492) or were issued by a subordinate officer, an associate solicitor (see J.A. 518). See *Hagen*, 510 U.S. at 420 (rejecting reliance on "merely passing references" to diminishment). The Cohen opinion has never been retracted or superseded. The official position of the Department of Interior remains that the Reservation was not diminished.

Nor is there any inconsistency, as petitioner suggests (Br. 43), between Felix Cohen's 1941 opinion and his 1942 citation of *Perrin* for the proposition that Congress has the authority to impose "liquor restrictions on lands ceded to [the United States] by the Indians when these lands adjoined Indian country." *Handbook of Federal Indian Law* 353 & n.26. As explained on the next page of that treatise, Cohen was relying on a definition of "Indian country" as "all lands and reservations, Indian title to which has not been extinguished." *Id.* at 354 n.32. Under such a definition, tribal lands purchased by the United States or non-Indian settlers would no longer be Indian country, whether or not within an existing reservation.

[18] See, *e.g.*, Act of Feb. 26, 1896, ch. 31, § 1, 29 Stat. 16 (one-year leave of absence for "settlers who made settlement under

(Continued on following page)

federal officials have sometimes made statements indicating that the Reservation was diminished (see Pet. Br. 41-44), those statements appear to be "merely passing references," and "not deliberate expressions of * * * conclusions about congressional intent in [1894]." *Hagen*, 510 U.S. at 420.[19]

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the homestead laws upon lands in the Yankton Indian Reservation"), Act of June 10, 1896, ch. 398, § 1, 29 Stat. 343 (appropriation for "artesian well or wells at or near Lake Andes, on the Yankton Indian Reservation"); Act of Mar. 3, 1905, ch. 1479, § 1, 33 Stat. 1068 (authorizing use of "land reserved for agency purposes on the Yankton Indian Reservation" as tribal park); Act of June 21, 1906, ch. 3504, 34 Stat. 371 (appropriation for "artesian well or wells at or near Lake Andes, on the Yankton Indian Reservation"); Act of Feb. 13, 1929, ch. 183, 45 Stat. 1167 (restoration to Tribe of "lands on the Yankton Sioux Indian Reservation * * * now reserved for agency, schools, and other purposes"); Act of July 6, 1954, ch. 463, 68 Stat. 452 (preamble) (authorizing funds for removal and resettlement of "the Indians of the Yankton Indian Reservation" residing on lands taken for water project).

[19] For example, petitioner notes (Br. 38, 44) the United States' statement 12 years ago in a footnote in a brief that, based on decisions of state courts in South Dakota, the Reservation had been diminished by the 1894 Act. See U.S. Br. at 17 n.10, *United States* v. *Dion*, 752 F.2d 1261 (8th Cir. 1985) (en banc). The boundaries of the Reservation were, however, immaterial to the issue in that case, which instead concerned whether the Bald Eagle Protection Act, 16 U.S.C. 668 *et seq.*, abrogated the Tribe's rights to hunt bald or golden eagles. The court of appeals did not make any determinations regarding reservation boundaries, since the violations had occurred on trust lands, and left unresolved, whether the conduct at issue had "occurred on the Yankton Sioux Reservation," 752 F.2d at 1270. Indeed, the defendant tribal members in *Dion* maintained

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Similarly, the federal cases on which petitioner relies (Br. 33-34) neither turned on the diminishment question nor presented any extended analysis of that question. For example, while petitioner asserts (Br. 33) that the diminishment analysis in this case is "controlled" by *Perrin*, the Court had no occasion in that case to decide whether the reservation boundaries had been diminished. The case concerned whether Congress had exceeded its authority in prohibiting liquor sales on lands opened by the 1894 Act. 232 U.S. at 483. The Court concluded that it had not. *Id.* at 485. Accordingly, since the Court did not hold that Congress's authority to prohibit liquor was limited to Indian reservations, the Court did not have to decide whether the ceded lands were, in fact, within the Reservation. The Court's description of the ceded lands as "formerly included in the Yankton Sioux Indian Reservation" (*id.* at 480) is merely a "passing

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that their conduct had occurred on the "Yankton Sioux Reservation," thereby asserting its continued existence. *Id.* at 1263

Petitioner also points (Br 44) to a Federal Register notice in which the Environmental Protection Agency expressed its "belie[f]" that "the State of South Dakota has sufficiently demonstrated that the Yankton Sioux Reservation was disestablished by the Act of 1894." Yet, the very title of that notice – "Notice of *tentative* determination" – indicates that it should not be accorded significant weight. 59 Fed Reg. 16,647, 16,649 (1994) (emphasis added). In any event, as petitioner acknowledges (Br. 44), EPA has since rejected that tentative belief

reference" that does not indicate any analysis of the diminishment issue. See *Hagen*, 510 U.S. at 420.[20]

To be sure, the State has asserted jurisdiction over the opened lands on the Reservation. See Pet. App. 33, 38. As this Court has recognized, however, such an assertion of jurisdiction, while of "some evidentiary value," is not dispositive of Congress's intent. *Solem*, 465 U.S. at 471. That is particularly so where, as here, there is countervailing evidence from Congress and the Executive Branch.[21]

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[20] The subsequent federal cases cited by petitioner (Br. 34, 38) merely assumed diminishment, without any independent assessment, and did not turn on the resolution of that question. See, *e.g.*, *Cihak* v *United States*, 232 F. 551 (8th Cir. 1916) (dicta) (application of Article XVII); *Forman* v *United States*, 256 F.2d 766 (8th Cir. 1958) (dicta) (allotment claim); *Yankton Sioux Tribe* v *United States*, 623 F.2d 159, 165 (Ct. Cl. 1980) (dicta) (land and trust fund claims related to 1894 Act); *Weddell* v *Meierhenry*, 636 F.2d 211, 213 n.2 (8th Cir. 1980) (dicta) (dependent Indian community), cert. denied, 451 U.S. 941 (1981).

[21] Petitioner also cites (Br. 35-36) several opinions of the South Dakota Supreme Court that state that the Reservation was diminished. Some predate this Court's recent decisions clarifying the criteria for assessing diminishment. The rest simply rely, without further analysis, on the earlier opinions. See *State* v *Williamson*, 211 N.W.2d 182, 183 (S.D. 1973) (analogizing 1892 Agreement to ordinary conveyance), *Wood* v *Jameson*, 130 N.W.2d 95, 99 (S.D. 1964) (summarily holding that Reservation was diminished); *State* v *Winckler*, 260 N.W.2d 356, 360 (S.D. 1977) (citing *Williamson*); *State* v *Thompson*, 355 N.W.2d 349, 350-351 (S.D. 1984) (citing *Williamson*); but see *Cournoyer* v *Montana*, 512 N.W.2d 479, 479

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In sum, as the court of appeals observed, government entities' treatment of the Reservation has been "mixed." Pet. App. 35. At a minimum, then, one must conclude, as in *Solem*, that the evidence is too "rife with contradictions and inconsistencies" to establish that Congress intended to diminish the Reservation. 465 U.S. at 478.

E. Demographic Patterns Do Not Establish Diminishment

Petitioner relies (Br. 48-49) on demographic patterns as additional evidence of intent to diminish the Reservation. But "[t]here are * * * limits to how far [the Court] will go to decipher Congress' intention in any particular surplus land Act." *Solem*, 465 U.S. at 472. The Court has never held a reservation to have been diminished based on demographic factors alone.

To the extent that demographic evidence can shed any light on the intent of the Congress that adopted a surplus land act, the most probative evidence is from the years immediately after the adoption of the act. Here, such evidence is, as the court of appeals charitably put it, "somewhat incomplete." Pet. App. 41. The 1900 census did not separately identify the population within the boundaries of the Reservation as defined by the 1858 Treaty. It

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(S.D. 1994) (referring to "physical confines of the Yankton Sioux Tribe reservation")

identified only the population of Charles Mix County, less than half of which falls within those boundaries. Those figures show that the County had 1,483 Indian residents and 7,015 non-Indian residents five years after the opening of the Reservation. Even assuming, as did the court of appeals, that the mix of Indians and non-Indians was the same throughout the County, Indians would still have constituted about 40 percent of the population within the original Reservation boundaries. *Ibid.*[22] This is not the sort of situation described in *Hagen* and *Solem* – "an area [that] is predominately populated by non-Indians with only a few surviving pockets of Indian allotments" – that would be probative of congressional intent to diminish a reservation. *Hagen*, 510 U.S. at 420-421; *Solem*, 465 U.S. at 471-472.

Even today, "between 32 and 44 percent of the people within the 1858 boundaries are Indians," depending on whether one uses 1990 census figures or the Tribe's own figures. Pet. App. 42. That is a significantly higher percentage than on the Lake Traverse Reservation, which the Court held to have been disestablished in *DeCoteau*, where Indians constituted only 9 percent of the population. See 420 U.S. at 428. And it is more than twice the percentage

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[22] It is reasonable to assume that most Indians lived on the Reservation in 1900, rather than elsewhere in the County. Indeed, at the time of the 1990 census, only eight of the 1,994 Indians in the County lived outside the Reservation. Pet App. 42-43

of Indians within the original reservation boundaries in *Hagen*. See 510 U.S. at 421. In short, the territory within the boundaries of the Yankton Sioux Reservation has not lost its "Indian character."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Acting Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
BARBARA MCDOWELL
Assistants to the Solicitor General
EDWARD J. SHAWAKER
JUDY RABINOWITZ
TSEMING YANG
Attorneys

SEPTEMBER 1997

Transcript of Oral Argument at 13-21, *Mattz v. Arnett*, 412 U.S. 481 (1973) (No. 71-1182).

[13] ORAL ARGUMENT OF
HARRY R. SACHSE ON BEHALF OF THE
PETITIONER AS AMICUS CURIAE

MR. SACHSE: Mr. Chief Justice, and may it please the Court:

The United States agrees with the position taken by Mr. Sclar and by the petitioner in this case. What I want to try to do is put this 1892 Act into a little bit of historical perspective.

As Mr. Sclar said, the Yuroks always lived in this area. Twice they had their reservation recognized by Executive Order, 1855 and 1891. The 1891 Act was an obvious reaction to the legal problems that had been recognized in the 1889 Court of Appeals case.

In 1892 it may be that the House of Representatives set out to take from these Indians much of what had been theirs. But what the House set out to do, the Senate corrected. And there is a very marked contrast between the Act that was finally passed and the Act that was introduced in the House. The Act as it was finally passed in our view is quite clearly a special allotment Act similar to a number of other allotment Acts that were passed in that general time and which did not terminate the reservation in question.

I would like to first mention something about the [14] General Allotment Act. I think that's important

in this. By the 1880's most of the Indian reservations had been created. But there was a pressure by the settlers around those reservations to get some of the land in the reservatons. They felt the Indians were not utilizing that land. And on the other hand there was a pressure to keep faith with the Indians and not to take from them what had recently been given to them. A sort of compromise was worked out in the General Allotment Act of 1887 called the Dawes Act. It has subsequently been repudiated in the Indian Reorganization Act of 1934. The Dawes Act set up this system, that whenever the President thought it was wise to do so, he could require all the Indians within a reservation to take allotments of a particular number of acres each. This would usually leave considerable land in the reservation that was not allotted. The President then with the consent of the Indians, which it was assumed in those days he could obtain, would open the rest of the reservation for homesteading, but the fees charged to the homesteaders would be used for the benefit of the Indians who lived on the reservation.

Now, that was the General Allotment Act. The General Allotment Act did not require the President to open any particular reservation in this way. And Congress passed a number of special allotment Acts. We have listed those that have been in litigation on page 22 of our brief, Footnote 18. [15] These special allotment Acts would take the matter out of the hands of the President and tribe and Congress would say, "We want allotments made on a particular piece

of land. We want, once the allotments are made, we want to open the rest of it to settlement, and we want funds collected from the settlers to be administered by the Government for the benefit of the Indians that lived on that land."

Many of the special allotment Acts made particular reference to the General Allotment Act saying that the allotments would be made under the terms of the General Allotment Act.

It's very significant that the funds obtained in such an Act were to be used for the benefit of the Indians who remained in the reservation. And this meant, of course, a continued Federal involvement with that reservation, both in handling the land transactions and in administering the funds that would be created by this procedure.

In our view, the 1892 Klamath River Act is that kind of special allotment Act. In our brief when we cited the language of the Act, we put in dark provisions, the part added by the Senate, which together with the final paragraph that had been there all along make this Act exactly a special allotment Act of the area of that reservation that was affected.

QUESTION: Ultimately homesteaders' land would be [16] within the reservation?

MR. SACHSE: That's correct.

Now, this Court early –

QUESTION: Would you take the same position even if some was allotted, some was homesteaded and the people and all the restrictions on the allotments had expired and the allotted lands had been sold to whites?

MR. SACHSE: Unless Congress had in some – we don't reach that issue here because there still is allotted restricted land in this reservation.

QUESTION: Well, let me ask you. In an Indian reservation that's along a river, who owns the bed of the river?

MR. SACHSE: Well, in this case, this Court in *Donnelly* has already held that the Indians own the bed of that river. It has never been taken from them.

QUESTION: And that has never been allotted to anybody, has it?

MR. SACHSE: It has never been allotted to anybody. That's still communely held Indian land as far as we are concerned, and there is not a word in the 1892 Act –

QUESTION: Whether the reservation exists or whether it doesn't, and regardless of who owns the river bed, is there some treaty or some law defining Indian fishing rights? Or is it just ancestral fishing rights that have been –

[17] MR. SACHSE: It's somewhere between the two. There were ancestral fishing rights, but this

Court in *Donnelly* held specifically that the 1891 Extension that ran snaking 40 miles down the river was done specifically to preserve the fishing rights that the Indians had.

QUESTION: Which were what?

MR. SACHSE: I think the exclusive rights to fish in that river.

QUESTION: The exclusive right to fish there?

MR. SACHSE: Since it was made an Indian reservation, the purpose of which is that this area is to be reserved for the Indians, and since surplus lands were sold but nothing was done –

QUESTION: You would say, then, I suppose, that since the Indians owned then and still own the bed of the river, that even if all of the riparian land was in other ownership, the Indians would have the exclusive right to fish in the river?

MR. SACHSE: I would say – yes, I would say that. But I don't think this case requires us –

QUESTION: Don't you have to hold that? Because there is some river riparian land that is not owned by the Indians.

MR. SACHSE: Well, here is the way I would analyze this case, but I think what you have raised is also a possible [18] analysis, a possible way to handle the case.

The 1891 Act established an Indian reservation, a mile on both sides of the river including the river and going all the way down to the sea. This Court in *Donnelly* held that one of the primary purposes of establishing that reservation was to secure to the Indians fishing rights of that river. That reservation has never been abolished. The 1892 Act which let other people than Indians settle in this area while preserving also Indian settlement, simply did not abolish the reservation. So the reservation is still an area of Federal jurisdiction and protection, except to the extent that Public Law 280 has given the State of California certain criminal and civil jurisdictions in it. Public Law 280 specifically reserves federally granted fishing rights and these were granted by Executive Order as this Court held in *Donnelly*

QUESTION: That still leaves the question of what – you said "exclusive."

MR. SACHSE: No. Let me say this. The issue was not argued below as to exactly what the consequences of this being held to be an Indian reservation. The court went up on the question it was not a reservation.

QUESTION: The scope of the Indian rights and whether or not the kind of fishing the Indians now want to do is the kind of a fishing right that was historically exercised has not been settled.

[19] MR. SACHSE: That is correct. And we have only asked this Cout to determine the question of whether this remains Indian country, whether this

remains an Indian reservation, with a remand after that has been determined to the California courts.

QUESTION: You think that it may be irrelevant whether the reservation exists or not if it's true that the Indians still own the bed of the river.

MR. SACHSE: I don't think it would be irrelevant. I think it would matter from the standpoint of criminal and civil jurisdiction. It would only be irrelevant if the Court were to find that Public Law 280 had granted such total jurisdiction to the State of California that even if it is a reservation all that is left is the ownership of the river. So I think it still is relevant.

I would like to get back to the specific point that this Court is faced with, and that is has this allotment process terminated the reservation. And because I am running out of time, I would just mention this very quickly. That in *United States v. Celestine,* the Court first had to determine this problem, 215 U.S. And in that case the Court held in a careful opinion that the General Allotment Act is inconsistent with termination of a reservation, that allotments under that Act and even disposal of lands to non-Indians does not terminate a reservation. In *United States v. Nice* at 241 U.S. – these [20] are all in our brief – the Court held that a special allotment Act should be interpreted in accordance with, policy in the General Allotment Act and that a special allotment Act on the Sioux reservation though it required the Sioux to take, on that reservation, allotments,

required the President to dispose of the extra land, did not terminate Federal jurisdiction, did not terminate the reservation, did not terminate Federal jurisdiction even as to the land that was disposed of to non-Indians.

This same policy is recognized more recently by this Court in *Seymour v. Superintendent* and also has been codified by Congress in its definition of Indian country as including all the land within the boundaries of an Indian reservation whether patented or allotted or not.

There have been two very recent cases we mention in our brief also, one in the Eighth Circuit, *City of New Town*, and another in the Supreme Court of South Dakota, *State v. Molash*, that had this same consistent interpretation of special allotments Acts indistinguishable from the 1892 Klamath River Act.

In closing, since I assume I am out of time, I refer the Court to page 17 of our brief where we have samples of language that Congress used when it did want to discontinue a portion of a reservation. "The Smith River Reservation is hereby discontinued," Congress said. Or. "The reservation lines [21] of the Ponca and Otoe and Missouria Indian reservations be, and the same are hereby abolished." There has been no confusion between an Act that simply opens

the reservation to allotment and settlement and one that abolishes the boundaries of a reservation.

Thank you.

* * *

Transcript of Oral Argument at 9-24, *Erickson v. Feather decided with DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148).

[9] ORAL ARGUMENT OF
HARRY SACHSE, ESQ., FOR THE
UNITED STATES AS AMICUS CURIAE

MR. SACHSE: Mr. Chief Justice, and may it please the Court:

I want to say a word first about any Indian reservation, before talking about this one, because it seems to me that the discussion so far has been a bit confusing about that.

In almost every Indian reservation in the country there's land that has been allotted to Indians, there's land that has been sold in fee simple to people who are not Indians. There's often a large non-Indian population inside an Indian reservation.

One of the characteristics of this reservation is that there's such a large Indian population inside, and that there's a going tribe, with an organized government and an agency of the BIA, and a very alive and viable situation.

Basically, and without trying to get into all of the details of it, the State in which an Indian reservation is [10] situated has full jurisdiction over non-Indians who live inside an Indian reservation, both civil and criminal jurisdiction. This Court held so in a number of cases, starting in the Nineteenth Century with *McBratney* and *Draper* which were criminal cases.

And Justice Frankfurter laid this out in a good deal of detail in *Cake vs. Egan* and the *Metlacotla* cases in about 380 –

QUESTION: Is that civil as well as criminal?

MR. SACHSE: Civil as well as criminal.

QUESTION: *Cake v. Egan* –

QUESTION: Irrespective of whether they live on allotted lands?

MR. SACHSE: Irrespective of where they live within the –

QUESTION: But in present actions with an Indian, they're going to be subject to federal law.

MR. SACHSE: Correct. If the transaction is with an Indian or affects the vital interests of the tribe, they're going to be subject to federal law. The exact extent of that is the kind of thing that's still debated before you, in a case such as the *Maserie* case that's under advisement.

QUESTION: And it may be debated eventually in this case, I take it?

MR. SACHSE: And may eventually be debated here.

Now, I think I need to review some law concerning [11] this Treaty as well as – this reservation, as well as the facts.

First, briefly to the facts:

A permanent reservation was established by Treaty in 1867, with surveyed boundaries. And it's this reservation, which is much smaller than the land the Indians had previously had. They had already had their big loss of land, and this was what was left to them, after great amounts of land had been taken away from them.

Then, by an agreement in 1889, made specifically under the General Allotment Act; and at a time when the Indians were in great distress, that the moneys owed to them by the federal government had not been paid to them, it was the middle of winter.

The federal government negotiated with the tribe to do what's known as open its reservation. That is, to allow the sale of surplus land within the reservation. And in this agreement and then in the Act of Congress that ratified it, there are numerous references to the General Allotment Act. There is no such thing as was true with the north half of the Colville Reservation, where a particular part of the reservation was cut off and express language was used, saying that that has been removed from the reservation.

You've heard some talk about the public domain. What's important in this Act is there is no language saying [12] that this was returned to the public domain.

QUESTION: But you do have language of "cession".

MR. SACHSE: You do have language of "cession", that is correct.

QUESTION: Isn't that even stronger?

MR. SACHSE: But there is no specific area ceded, what's ceded is what is not allotted –

QUESTION: But, as a matter of fact, it's treated as the public domain.

MR. SACHSE: I – I don't know what you mean by that.

QUESTION: Well, what happened after the ceded property?

MR. SACHSE: After the property was ceded, –

QUESTION: Yes?

MR. SACHSE: – the government sold that land under –

QUESTION: Treated it like the public domain.

MR. SACHSE: Well, only in the exact same sense that it –

QUESTION: Well, it was handled as part of the public domain, by the same system that the public domain was handled.

QUESTION: Weren't they acting for the Indians?

MR. SACHSE: That is to say – and I'll try to get this in the – I think I may do better to break it down into historical perspective.

[13] But the Indians were paid for the land. How were they paid for it? It was put in the Treasury of the United States, to be used for their benefit. In other words, it's a bookkeeping entry from one government place to another. The money – the Indian Agency was maintained, the money was appropriated by the government as needed for the Indians. The land was opened for homesteading but only for homesteading, not for any purpose.

You have the exact same actual dynamics that occurred in the south half of the Colville Reservation, which this Court held in *Seymour v. Superintendent*, did not abolish that reservation.

The same dynamic that was done in *Mattz* v. *Arnett*, as to that reservation; namely, the non-Indians got what they wanted, the Indians got what they could. The non-Indians got the right to settle that land. The Indians got the money from the settlement of that land, which was small enough.

The question remaining is: What happened to the federal jurisdiction? What happened to the jurisdiction of the tribe?

And I want to approach that problem now.

QUESTION: Would it be fair to say that the United States in those transactions was acting as

the broker for the Indians, to announce publicly that settlers could come in and buy it for $2.50 an acre?

[14] MR. SACHSE: It's exactly so, and we quote in our brief where one of the Senators objected to the cession idea, to the fact that the government would pay the money immediately.

And one of the other Senators explained to him, said: This doesn't mean anything, because this is just a bookkeeping transaction in the Treasury. We get right back the money that we're going to pay to the Indians, as we sell off the land.

Now, in some later Acts, the government decided to do it the other way, to not pay the Indians at first, to only pay the Indians as the land was sold.

But the practical effect of both kinds of Acts is identical, that the Indians kept, lived on the allotted land, the unallotted and was opened up for homesteading, because it was thought in this – this was said to the Indians in the negotiations, and the Court talked about this in *Mattz* – this Court talked about this in *Mattz vs. Arnett*.

The excuse for doing this kind of thing was that it was for the benefit of the Indians to do it, that it was better for them to live next to a high caliber of citizen who would be farming his land, and so forth. That's the kind of language that was used.

And that was the same whether the Indians said they ceded it first, or said – or the government acted as agent, disposing of it.

And, by the way, this language "cession" in the *Ash* [15] *Sheep* case, which we discuss in our brief, is used in connection with an arrangement where the government only acted purely as agent, where they simply – whenever someone wanted a piece of the land, would sell it to him then, and give the money to the Indians. The word "cede" was used.

But obviously with no technical –

QUESTION: What impact, if anything, did the cession have, followed by the sale for homesteading or the settlement for homesteading? What happened as a consequence, or what was the impact with respect to the jurisdiction of the State, if anything?

MR. SACHSE: Of the State? None. None.

The cession of the land or the selling in fee simple of land inside an Indian reservation, say, as in the reservation in *Mattz – in Seymour vs. Superintendent,* the south half of the Colville. That then is land owned by a non-Indian inside an Indian reservation.

QUESTION: Well, yes, but you would apparently think the State has civil and criminal jurisdiction over non-Indians on that.

MR. SACHSE: Clearly.

QUESTION: How about the State's trespass law?

MR. SACHSE: The State's – the State's trespass law would clearly apply to non-Indians, but that would be – to the extent that it is applying –

[16] QUESTION: Well, how about to the owner – how about the owner of the deeded land, the ceded land, he now has a fee simple title to it –

MR. SACHSE: Okay.

QUESTION: – and he wants to keep people off his land, and he does it in the name of the State's trespass law. May he do so?

MR. SACHSE: I don't think he could keep an Indian from –

QUESTION: Really?

MR. SACHSE: It seems to me that inside an Indian reservation –

QUESTION: Well, let me talk to them about –

MR. SACHSE: Yes?

QUESTION: – a non-Indian. Can he keep a non-Indian off in the name of the State's trespass law?

MR. SACHSE: Clearly, yes.

QUESTION: So the State's law does apply there.

MR. SACHSE: What I'm saying is that in a transaction between an Indian and a non-Indian –

QUESTION: Well, I didn't ask you about transaction, Mr. Sachse, I asked you about the State's trespass law.

Does the State – after the land is deeded, does the State's trespass law apply to that land?

Certainly it doesn't –

[17] MR. SACHSE: It applies to that land as to non-Indians but not as to Indians.

QUESTION: So an Indian –

MR. SACHSE: The State's criminal law does not apply to Indians inside an Indian reservation.

QUESTION: And so it just – so the State sovereignty just doesn't apply to that land, no matter who it's owned by, as far as keeping an Indian off of it is concerned?

Is that your thesis?

MR. SACHSE: I think that's correct. That would be under federal law or under tribal law, if it's a matter affecting an Indian inside an Indian reservation.

Now, the General Allotment Act left a lot of questions unresolved. And the early questions that were unresolved was whether a reservation existed at all after there had been allotments, and whether even allotted land was Indian land under federal jurisdiction.

And the Court first addressed that question in 1909, in *U.S. v. Celestine*, in which it held that even though land had been allotted to an Indian and patented to the Indian, that the land remained inside the Indian reservation, that no land was removed from an Indian reservation until it specifically removed by Congress from the reservation.

That proposition was extended in 1916, in *United* [18] *v. Nice* which held that the tribal relations of the Indians continues and that federal liquor laws would apply to Indians anywhere within the reservation. But, the important thing was this, that the States were claiming, just as the State claims here, that opening a reservation and alloting lands to Indian meant that federal jurisdiction and tribal jurisdiction would only apply on the allotted lands. This creates several problems, one's the obvious one of having to check plat books to see whose jurisdiction applies where, the other one's even a bit more complicated, these red dots move around, the Tribe buys new land, land can be consolidated. As under a recent act of Congress, this Tribe has an active program of purchasing new land which Congress described as within the reservation. Thereby, again recognizing that the reservation still existed.

QUESTION: Must have been the situation for a good many years?

ANSWER: Thats right.

QUESTION: Hasn't been a great deal of trouble about it, has there?

ANSWER: Well, I think there has. What has really occured is that there has been no law and order on a lot [19] of Indian reservations. And part of the problem has been that the federal government hasn't done its job, the State hasn't done their job, and the tribes have been too weak to do anything.

QUESTION: Well, what is the State's job? What does this State – on an Indian reservation?

MR. SACHSE: In this – in a reservation –

QUESTION: On an Indian reservation, what is the State's responsibility, if any?

MR. SACHSE: The State's responsibility in an Indian reservation is as to non-Indians, to maintain law and order in matters between non-Indians. The federal government and the tribe have responsibility of maintaining law and order in matters that affect Indians.

And neither one of them should have to look at the plat book to do it. It's a question of whether the person is Indian or non-Indian. That's a difficult enough problem, without having to figure out whether a policeman can go on this piece of ground or that piece of ground.

QUESTION: Does a non-Indian ever get in conflict with an Indian?

MR. SACHSE: Yes, and when that happens, that's federal jurisdiction, under 18 U.S.C. 1151. And it makes a good deal of sense for the federal –

QUESTION: Is that generally or is – that's true [20] if it's on a reservation.

MR. SACHSE: If it's on a reservation, that's right.

QUESTION: But not otherwise.

MR. SACHSE: If it's off the reservation, it would – it would not, that's right; it would be State jurisdiction.

QUESTION: In a civil dispute –

MR. SACHSE: No. Excuse me, that's inaccurate. If it's not on Indian country, it would be State jurisdiction. There could be Indian country off a reservation.

QUESTION: Well, yes. Patented land is Indian country by statutory definition; correct?

MR. SACHSE: That's right.

QUESTION: In a civil dispute, under *Williams v. Lee,* isn't a federal question, it's a question for the tribal court, if it's on a reservation.

MR. SACHSE: That's correct. That within an Indian reservation, in a matter affecting Indians, the jurisdiction – the original jurisdiction, the root of the jurisdiction was tribal jurisdiction. But the federal government, through numerous statutes, has preempted great parts of that jurisdiction. And for all major crimes, for instance, there's federal jurisdiction.

But in a civil dispute between an Indian and a non-Indian on an Indian reservation, it's tribal jurisdiction.

That's *Williams vs. Lee.*

[21] QUESTION: Laying aside the major crimes question, and you had a very simple statement that I understood thoroughly for a moment or two there – when you said it desn't depend on geography or plats, it depends on the racial origin.

Now, were you confining that to reservations, as you suggested first, or to Indian country?

MR. SACHSE: I'm – that is true in Indian country. But if you – Indian country is any land inside a reservation. If this Court were to hold this reservation had been abolished by the 1891 Act, which I think would be a very restrictive and artificial interpretation of what the Court's done in *Mattz* and in *Seymour vs. Superintendent,* and I think it would also undercut 18 U.S.C. 1151 seriously. At least for this reservation.

QUESTION: Yes, but go ahead. If the Court should hold –

MR. SACHSE: If the Court should hold that, then each one of these red spots is a little island of federal and tribal jurisdiction, and we're not in a time now when these –

QUESTION: That's the way it's been, isn't it, as my brother White suggested?

MR. SACHSE: The way it's been is that everyone has ignored both the Indian and federal rights there, and this – [22] I don't want to testify, but I don't think the Court should assume that the situation has been good, and that you can assume that because we haven't faced this issue before that it's perfectly all right to leave it another fifty years.

QUESTION: On the other hand, if the Court should decide that the statute, the cession statute didn't amount to a conveyance, –

MR. SACHSE: Yeah.

QUESTION: – then the result would be that the State would no longer have any power to enforce its laws in any of these several counties, if any Indian was involved.

MR. SACHSE: That's correct. It would be a federal question, as in any other Indian reservation, –

QUESTION: Wherever it occurred.

MR. SACHSE: – wherever it occurred, and this is something that Congress has decided is a proper way for the federal government to exercise its –

QUESTION: Well, if this is an Indian reservation.

MR. SACHSE: Yes. And whether this one is or not, it would be the same situation you're describing in other reservations of the State, that clearly are reservations.

We're speaking of the proposition that this, what we call a reservation, where a major tribe lives and where there's a major number of Indians, should be treated like the other Indian reservations in the State.

[23] QUESTION: Well, I suppose the vast proportion – this is something like, what, 27,000 non-Indians and a few, 3,000-plus Indians?

MR. SACHSE: That's right.

QUESTION: In this Lake Traverse area.

MR. SACHSE: That's correct.

But we're not trying to subject the non-Indians to federal or Indian jurisdiction except to the extent needed to fulfill the trust responsibilities –

QUESTION: Which means that whenever they're involved with an Indian –

MR. SACHSE: That's right.

QUESTION: – the State does not have any jurisdiction –

MR. SACHSE: That's correct.

QUESTION: – with respect to its civil, criminal or family or status law.

QUESTION: It was suggested that the tribe had recently passed an ordinance that asserted rather expansive jurisdiction within this area. Is that true or not?

Or do you know?

MR. SACHSE: I haven't seen it. I've heard that that's so. I suspect that it goes beyond the authority that the tribe has.

QUESTION: Because it reaches non-Indians?

[24] MR. SACHSE: Yes.

QUESTION: Well, how do we know that the tribe doesn't have authority to reach non-Indians?

MR. SACHSE: Well, the *McBratney* case and the *Draper* case in criminal matters.

QUESTION: Well, all *McBratney* says is that the State has the right to try a white man for a crime that took place on an Indian reservation. It doesn't say the tribe couldn't try him.

MR. SACHSE: Well, I suppose I just have to answer that this has been the – at least tacit holding of this Court, or assumption of the Court in a number of cases. And I refer to *Cake v. Egan,* where Justice Frankfurter tried to lay out the limits on tribal jurisdiction. And it's never been faced directly in the last ten years, perhaps, by this Court, but it has been faced before.

QUESTION: Well, –

MR. SACHSE: My time is up, and I'm feeling bad about taking all the time of my partner.

MR. CHIEF JUSTICE BURGER: We'll take care of that; you're on our time for a minute or two here. Mr. Justice White, did you have a further question?

QUESTION: No, I didn't.

MR. CHIEF JUSTICE BURGER: We'll hear from your friend, then.

Transcript of Oral Argument at 18-30,
Rosebud Sioux Tribe v. Kneip,
430 U.S. 584 (1977) (No. 75-562).

* * *

[18] ORAL ARGUMENT OF H. BARTOW FARR, ESQ. ON BEHALF OF U. S. AS *AMICUS CURIAE*

QUESTION: Mr. Farr, before you commence, will you help me understand the facts situation?

The main issue, as I understand it, is the boundary of the Reservation.

MR. FARR: That is right.

QUESTION: The location of the boundary. Who occupies the land within the disputed area? Do Indians still occupy part of it?

MR. FARR: There are Indians within the disputed area but I think the area is largely occupied by whites who purchased or successors of the people who purchased the open lands.

QUESTION: Right. And the principal interest of the Indian Tribe, as I understand it, is whether the Tribe or the state exercises jurisdiction within the disputed area.

MR. FARR: The Tribe and the Federal Government or [19] the state, yes.

QUESTION: Right. Well, who, in fact, has exercised jurisdiction legally? What laws have prevailed within the disputed area in recent years? How far back?

MR. FARR: Well, this is a question which I think the record is unclear on, Mr. Justice Powell. Essentially, the United States, as the United States understands the position – of course, not having been the party to the suit throughout, there has been some exercise of jurisdiction by the state, they having taken the position that this is land outside of an Indian Reservation to which their jurisdiction applies.

QUESTION: Have state criminal laws been imposed or enforced within the disputed area?

MR. FARR: I believe that the state has, you know, gone ahead and imposed state criminal law as well as, though, I think the Federal Government and the U.S. Attorneys have also imposed some federal law but there has basically been a kind of working relationship in this area.

I am not sure how much of this is reflected by the record but I think as a practical matter that is generally what has been happening.

QUESTION: All right. Just one other question. We are not concerned with the individual title of any particular parcel of land, are we?

[20] MR. FARR: We are not.

QUESTION: Just the boundary of the reservation.

MR. FARR: That is right.

QUESTION: Right.

MR. FARR: Mr. Chief Justice and may it please the Court:

The United States is appearing this afternoon as *amicus curiae* is support of the position of the Rosebud Sioux Tribe that the decision of the Court of Appeals for the Eighth Circuit should be reversed.

We think that under the principles set forth by this Court in previous cases, particularly in *Seymour*, *Mattz* and *DeCoteau*, that it is clear that the acts of 1904, 1907 and 1910 did not disestablish the boundaries of the Rosebud Sioux Reservation in the areas to which they applied.

I would like to note briefly at the outset one important general point. In suggesting that Congress did not disestablish the boundaries of the Reservation in the early 1900's, we do not mean to imply that Congress expected that those boundaries and the boundaries of comparable reservations were going to continue indefinitely.

We agree that in the early 1900's, Congress contemplated at some period of time that the Reservation system would, in fact, come to an end but we believe that time was when the trust period on Indian allotments expired and the [21] assimilation of

Indians and white settlers on the lands had been accomplished.

QUESTION: And in your view, it would have taken an Act of Congress later, then, to –

MR. FARR: That is corect. Congress at some point would have found that the assimilation had occurred and would have passed an Act abolishing the Reservation.

At that point, all of these lands and all of the people on it – except if the Federal Government wished to retain jurisdiction over the Indians – would have gone within state jurisdiction.

In 1934, however, as the Court is aware, Congress reversed that policy when it passed the Indian Reorganization Act and definitely extended the trust period on the Indian allotment.

I will discuss that more briefly in connection with the General Allotment Act of 1887.

Because this case involves an issue of statutory interpretation, the United States does not urge or perhaps even believe it is possible for this Court to lay down a binding fixed rule that would govern construction of acts in all similar cases.

However, we do believe it is appropriate for this Court to reaffirm the principle that except for the language of an act or the compelling legislative history, shows a clear [22] intention by Congress to contract Reservation boundaries and limit federal

jurisdiction over certain areas of Indian reservations, that whenever Congress without a binding agreement opens lands to white settlers, it does not pay for them and does not guarantee any payment but only agrees to act as trustee for future uncertain sales and leaves the property interest in the Indians – as they did in this case – that act does not remove the lands from the boundaries of the Reservation.

As this Court said in *Seymour,* discussing an act with very, very similar terms, the purpose of the 1905 Act is neither to destroy the existence of the Reservation nor to lessen federal responsibility or jurisdiction over the Indians having tribal rights on that Reservation.

Now, this principle that Congress did not intend to disestablish the Reservations is not one that the government has made up out of whole cloth. It is supported both by history and by the previous decisions of this Court.

To begin with, it is well-recognized that the Tribes are entitled to rely on certain rules of statutory construction. In particular, doubtful expressions are to be resolved for the benefit of the Indian.

More particularly, in cases of these types – of this type, the intent to disestablish Reservation boundaries must be made clear, either from the Act or the legislative [23] history and as this Court said in *Rice versus Olson,* the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the

nation's history. All of these rules of construction apply to the case at hand.

Equally important –

QUESTION: Mr. Farr, may I interrupt you?

MR. FARR: Certainly.

QUESTION: As I understand the geography, we really are not talking about very many Indians because all of the unsold land has been restored to the Indians and all the land which was sold was sold to whites. Isn't that right?

MR. FARR: Well, those facts are true, yes. But in terms of the area in which we are talking about, we are talking about a considerable area of land in which Indians will either be able to move within federal jurisdiction or will be moving within the state jurisdiction and of course, Indians do have allotments within those open areas.

QUESTION: Within the open areas.

MR. FARR: Yes. They do.

QUESTION: But could you clarify one thing? What percentage of the – what portion of this total land was restored in 1934? How much of the original reservation is in dispute?

MR. FARR: I would love to answer that question but I have no idea.

[24] QUESTION: The record does not tell us, I take it.

MR. FARR: No.

QUESTION: But these would be probably noncontiguous parcels, wouldn't they? The would be little islands.

MR. FARR: They are likely to be, right. I mean, depending on the settlement practices and who defaulted and who did not, the lands that would be left available would be likely to be individual tracts. That is correct.

QUESTION: One more last question. Does the record tell us how many Indians live on the lands in dispute?

MR. FARR: I believe that there is a figure stated in one of the opinions below that – I think that the Reservation covers about 7,000. I think that the areas that we are talking about, the counties that we are talking about, the number of Indians is somewhere around 1,600 or 1,700. I think that is reflected in the record.

QUESTION: I see. And those would be Indians that reacquired lands or now occupy lands which were originally –

MR. FARR: Well, not necessarily. Again, they may be Indians who were allotted lands at the time that these areas were opened. When the areas

were opened, Indians were first given an opportunity to select allotments within those areas.

QUESTION: Well, wouldn't, by virtue of those allotments, wouldn't that land be Indian country?

MR. FARR: That land is Indian country.

[25] QUESTION: There is no dispute about that.

MR. FARR: No, I don't believe so.

QUESTION: How many Indians occupy land over which there is a dispute? Do we know that?

MR. FARR: I do not know.

QUESTION: And there would be very few, would there not?

MR. FARR: Well, I don't know how many there would be, but I think – I might just say that the principle, I think, extends further than that because jurisdiction, if it only applies on allotments, the Indians, any time they step off their particular allotments onto territory that is owned by a white settler may at that point be subject to state jurisdiction and that is something that clearly the Indians do not want and which is an interest we feel that we ought to protect in this case.

Turning to the General Allotment Act of 1887 briefly –

QUESTION: In other words, the nonreservation land can be and is Indian country if it is owned by the individual Indians.

MR. FARR: That is correct. That applies in –

QUESTION: And by the same token, or the other side of the same coin, within a Reservation there can be fee simple and non-Indians.

MR. FARR: Well, there can be fee simple and [26] non-Indians in terms of land ownership.

QUESTION: That is what I mean.

MR. FARR: No question. However, for purposes of jurisdiction –

QUESTION: Well, we are talking now about the geographic boundaries of the Reservation.

MR. FARR: That is correct. Now, the definition of Indian country, just to make sure that I have answered your question properly, the definition of Indian country in 1151 includes all areas including patented lands within a Reservation within Indian country and also, Indian allotments outside the boundaries of a Reservation within Indian country.

QUESTION: So within a Reservation, land owned in fee simple by non-Indians is still Indian country.

MR. FARR: That is correct.

QUESTION: Do you know what the relative proportion of whites and Indians is in the area that is disputed?

MR. FARR: If my memory serves me correctly, Mr. Justice White, I think there are somewhere around 16,000 whites and 1,600 Indians.

QUESTION: 16,000 whites and 1,600 Indians.

MR. FARR: I believe that is correct.

We also believe, in addition to the presumptions that I discussed a minute ago, that the General Allotment Act of 1887 has – that the policies and objectives of that are [27] consistent with the principle that an act such as this does not disestablish Reservation boundaries.

Although Respondents in their brief have continually turned the General Allotment Act on its head saying that it embodies the intent of Congress to disestablish Reservations, this Court has considered that precise question in several recent cases and found the opposite intent and we believe the Court correctly identified the intent of the General Allotment Act only last term in *Moe versus Confederated Salish and Kootenai Tribes,* in which you quoted from *Mattz* with approval the following language:

"Its policy, that of the General Allotment Act of 1887, was to continue the Reservation system and the trust status of Indian lands but to allot tracts to individual Indians for agriculture and grazing. When

all the lands had been allotted and the trust expired, the Reservation could be abolished." And that is the Act of Congress that I said in answer to your question, Mr. Justice Rehnquist.

Unalloted lands were made available to non-Indians with a purpose in part of promoting interaction between the races and of encouraging Indians to adopt white ways.

QUESTION: When was that Act?

MR. FARR: That is 1887.

QUESTION: '87.

MR. FARR: Right.

[28] And in fact, Respondents have said that this Sioux Act, in fact, followed along from that general plan.

We think that that indicates that the Court has recognized an intent to retain jurisdiction and control over those lands during the trust period with the consideration of whether to end the Reservation to be made at a later time when the assimilation had occurred and we think the Court has noted that even more specifically in the cases in which we very heavily rely on in our brief. *Seymour* and *Mattz* and also in *DeCouteau,* which distinguishes both cases in a case where sale was made for a sum certain and an agreement was made, as counsel for the Tribe has discussed.

In addition to these guiding principles, we also feel that the legislative history and the administrative treatment that we have set forth in our brief supports the position of the Tribe.

The remaining question then is, what is there sufficient to override this in the materials that the Court has before it?

Most importantly we call the Court's attention to the fact that there is nothing in the Act that says specifically that jurisdiction over these areas was to be given to the state.

In fact, I think, as a reading of the legislative history shows, Congress was really not concerned with the [29] jurisdiction at this point. The pressure on Congress was to open up lands for white settlers for two reasons, one, the settlers wanted the lands and two, the counties wanted a greater tax base.

Both of those objectives could be met perfectly comfortably by Congress by opening lands within the Reservation boundaries without sacrificing the principles of the General Allotment Act of 1887 which was to continue the Reservation during the period of assimilation.

QUESTION: Well, could the counties tax white-owned lands within the Reservation?

MR. FARR: Yes.

I don't believe that there is any dispute about that, but that was considered at that time and I

believe, even now, would be considered land that is within the power of the state to tax.

In *DeCoteau*, in fact, discussing the – this particular conflict of policy the Court said, in 1887, the General Allotment Act was enacted in an attempt to reconcile the government's responsibility for the Indians' welfare with the desire of non-Indians to settle upon Reservation land and we submit in this case that the best way to reconcile those and the way that Congress did reconcile them throughout this period was to continue the Reservation system but open white lands so that they would have a taxable base for the county and [30] the whites would have the additional lands.

For those reasons, as my time is getting short, I will close and simply suggest that the decision of the Court of Appeals should be reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, Mr. Farr.

* * *

Transcript of Oral Argument at 18-27,
Hagen v. Utah,
510 U.S. 399 (1994)
(No. 96-6281).

* * *

[18] ORAL ARGUMENT OF
RONALD J. MANN ON BEHALF OF THE
UNITED STATES AS AMICUS CURIAE
SUPPORTING THE PETITIONER

MR. MANN: Thank you, Mr. Chief Justice, and may it please the Court:

The question before the Court is whether the provisions of the 1902 and 1905 acts that opened portions of the Uintah Indian Reservation to settlement by non-Indians operated to exclude from the reservation the lands that were opened to settlement.

QUESTION: Mr. Mann, let me ask you the same question that I asked Mr. Seneca. If all we have before us is the language of the 1902 act, speaking of restoration to the public domain, if land had been restored, would the reservation boundary be excluded, in your view? Was that language clear enough under the Seymour case, and DeCoteau, and some of the others?

MR. MANN: We think it's quite clear that the language would not have been sufficient to alter the boundaries of the reservation. The Court's decision –

QUESTION: How do you explain away Seymour and the other cases indicating that that language is [19] sufficient?

MR. MANN: I don't think that those cases do indicate that the language is sufficient. If I could sort of take you through the cases where this Court has referred to public domain language in statutes affecting reservations, the statute at issue in Seymour actually had also been considered by the Court in an earlier case, United States v. Pelican in 1914, but in both cases the key thing to realize is that the statute does not simply say that the land is being restored to the public domain. It states that the reservation is being vacated and restored to the public domain. Now, the word vacate in our mind carries much more of a connotation of surrender, or cession of the type that has been required in this Court's later decisions, so that doesn't really seem to us to speak to this issue directly.

QUESTION: I would think that that phrase hurts your case rather than helps it. It shows that restored to the public domain means being taken away from the reservation.

MR. MANN: Well, no, actually –

QUESTION: Being vacated and restored to the public domain. It doesn't mean merely that white settlers are going to be allowed to come in. It means it's off the reservation from now on.

[20] MR. MANN: Well, it suggests that the reservation is being vacated, and there are a number of things that can happen when the reservation is vacated. In this particular instance, the land is being restored to the public domain.

I think that the clearest description –

QUESTION: What does that mean, though, and restored to the public domain? What do you think it means in that context?

MR. MANN: Well, the clearest explanation the Court has given in this context is in footnote 17 of the opinion in Solem, where the Court indicated that the phrase could well have referred to the fact that the lands were being made available for sale to non-Indians.

The reference to public lands in Federal statutes has traditionally referred to lands that are available for sale as opposed to lands owned by the United States that had been set aside for some other use, and that's what the Court in the Solem case referred to. The – stated that a reference to public domain in this context was perfectly consistent with a continuing reservation status.

There's no reason why lands could not be within an Indian reservation and be available for sale to non-Indians. That's the exact thing that happened in each of [21] this Court's cases involving surplus land acts in which the Court held a reservation was not diminished.

QUESTION: And you say that that's the meaning of restored to the public domain, land on reservation which is available for purchase to non-Indians is referred to as public domain.

MR. MANN: It doesn't matter whether it's on a reservation or not, but the phrase, public domain, could be understood to refer to lands that are owned by the United States that are available for sale.

QUESTION: Do you have any instance where – you say it could be. Do you have any instances where it has been, other than this statute?

MR. MANN: The statute at issue in Solem, that's what the Court indicated the most likely understanding of the –

QUESTION: That wasn't the operative language there. That was just –

MR. MANN: No, but the Court did hold that the land was on the reservation. That was the holding of the Court, and the statute stated the land was in the public domain, so the legal effect of the Solem decision is that land which Congress had described specifically as being in the public domain, albeit offhandedly, but in an act that Congress enacted and the President signed, stated that [22] that land was in the public domain, and this Court held that it remained on the reservation.

QUESTION: Well, how about the Rosebud case, where the statute said restored to the public domain resulted –

MR. MANN: Now, in that case also, you'll – if you – when you look at the Rosebud opinion, the statute to which you're referring is not the statute that was at issue before the Court, and the reference occurs in a footnote in the facts statement that described how the Rosebud Sioux Reservation came to the size that was at issue before the 1904, 1907, and 1910 acts, and if you actually look at the statute in that case it becomes fairly clear why the parties before the Court conceded that the statute altered the boundaries of the reservation.

The title of the statute states that its purpose is to divide a portion of the reservation of the Sioux Nation into separate reservations and to secure the relinquishment of the Indian title to the remainder.

QUESTION: Well, was that mentioned in the opinion?

MR. MANN: I'm not sure whether it was or not.

QUESTION: If it wasn't mentioned in the opinion, it doesn't add anything to your argument, it [23] seems to me, to say there were even additional reasons than those mentioned in the opinion for reaching the result.

MR. MANN: Well, the opinion did not necessarily reach the result. The parties conceded

that the reservation – that the land in question there has been removed from the reservation, and the Court was simply summarizing the fact that that – that the land in question was no longer part of the reservation because the Great Sioux Reservation no longer existed, and what remained was the Rosebud Sioux Reservation at issue in the case.

And then the Court went on to consider whether the Rosebud Sioux Reservation had been diminished by the statutes at issue there, so we think that was adequately explained by the fact that the parties would have had no possible basis for suggesting the reservation continued in existence in light of the clear purpose of the statute at hand.

QUESTION: Mr. Mann, in deciding whether the public domain language could mean what you claim it does mean, I suppose we look to intent, and there was a reference to congressional intent a moment ago. The conclusion that was stated was that there was no sort of specific indication, specific to the statutes involved [24] here, of congressional intent.

Isn't it fair to say, however, that if we look further into the state of the congressional enactments at the time of the 1902, 3, 4, 5 acts, that there was very clearly a policy of the United States, an indication of the policy of the United States in effect to end the reservation system, and shouldn't we read the language in light of that broader policy?

MR. MANN: Well, this Court has had a number of – cases that have considered surplus land

acts from this period of time, and I think it's fair to say that –

QUESTION: And we declined to do that –

MR. MANN: – in all – in all –

QUESTION: – but were we right, or were we wrong?

MR. MANN: No, I think you were right, because the – what's going on here is, the question of whether reservation boundaries were going to be altered at the time had little practical significance, because the question of criminal jurisdiction turned on the definition of Indian country, which at the time turned solely on who owned the land, so when Congress opened the land to settlement by non-Indians, by that very action it was removing at the time the land from jurisdiction. It didn't have to consider whether it was going to alter the [25] reservation boundaries.

Now, what the Court has done is, it's assumed that if Congress intended to alter reservation boundaries, typically Congress would have stated so specifically, and it's looked very closly to the language of the statutes, and it has had a number of statutes where Congress has quite clearly stated that it intended to alter the boundaries of reservation, and those statutes appear in DeCoteau and Rosebud, and if you look at them, they quite clearly state more or less that the land is being ceded, surrendered, and conveyed, and the Indians are –

QUESTION: Well, certainly, saying more or less is really something of an understatement, because I don't recall in either of those cases that the language said, we intend to alter the boundary of the reservation.

MR. MANN: Well, the language in DeCoteau said that the Indians cede, sell, relinquish and convey to the United States all their claim, right, title, and interest in the land in question, and the statute in Rosebud stated that the Indians cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all the land in question.

It would be rather difficult, I think, to construe that language as language that allowed the Indians to retain sovereignty over the land.

[26] QUESTION: I think you're probably right, but to – I wouldn't say that to – it is paraphrasing the language you just quoted to say, Congress says we intend to diminish the reservation.

MR. MANN: I think it is paraphrasing the language to say that that is unambiguous language of cession of the reservation from the Indian tribe to the United States.

QUESTION: Well, it was cession, but this was not cession. I mean, Congress can proceed in one of two ways, either by getting the tribe to cede it, or, if the tribe does not wish to cede it under Lone Wolf, simply declaring the reservation ended. You would

not expect to have the language of cession when there's been no cession, and that's what it is asserted occurred here.

MR. MANN: Of course, the statute in Rosebud was enacted long after Lone Wolf as well, and the Indians are not consenting Congress used the language of cession. That seems to be – that phrase seems to be the phrase Congress used when it intended to alter the boundaries of a reservation.

QUESTION: Well, when it intended to alter the boundaries of the reservation by cession. That much is clear. But still, isn't it the case that in deciding what to make of the less explicit language, the reference to [27] returns to public domain, that we should construe that in light of the overriding congressional policy, which at the time, as I understand it, was to end the reservation system?

MR. MANN: Well, but the policy was that the reservation system would be ended sometime, because Congress anticipated that it would end the reservation system in the future. The concept was not to end the reservation system directly by these particular statutes. The Court has repeatedly said that some of the statutes ended them, and some of them didn't.

QUESTION: Thank you, Mr. Mann.

* * *

1997 WL 762057

Supreme Court of the United States.
SOUTH DAKOTA, Petitioners
v.
YANKTON SIOUX TRIBE, et al.
No. 96-1581.
Monday, December 8, 1997

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REBUTTAL ARGUMENT OF MARK W. BARNETT ON BEHALF OF THE PETITIONERS

Washington, D.C.

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

Oral Argument

Appearances: MARK W. BARNETT, ESQ., Attorney General of South Dakota, Pierre, South Dakota; on behalf of the Petitioners. JAMES G. ABOUREZK, ESQ., Sioux Falls, South Dakota; on behalf of the Respondents. BARBARA B. MCDOWELL, ESQ.,

Assistant to the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae, supporting Respondents.

[3] PROCEEDINGS

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 96-1581, South Dakota v. Yankton Sioux Tribe.

General Barnett.

ORAL ARGUMENT OF
MARK W. BARNETT ON BEHALF
OF THE PETITIONERS

MR. BARNETT: Mr. Chief Justice, and may it please the Court:

The case that is before the Court today involves the question of whether an 1894 Act of Congress had the intent and the effect of disestablishing the Yankton Sioux Reservation. The State submits that the answer is conclusively yes. And we base that "yes" on several factors, the first and not least of which is the use of "cession and sum certain" language in the operative – or terms – in the operative section of the agreement and the ratifying Act.

That particular "cession and sum certain," the cession, sale, relinquishment and conveyance of all interests in and to the unalloted land, together with

the sum certain, has been held by this Court to create an almost insurmountable presumption, or a nearly conclusive presumption. And we would submit to the Court that that, in combination with the immediate uptake of jurisdiction [4] by the State of South Dakota in 1895, and continuously uncontested State jurisdiction during the next 100 years, and throwing that together with the fact that that jurisdiction was exercised without objection by the Tribe and without an attempt to exercise jurisdiction by the Tribe or the Federal Government throughout those 100 years, and that's not merely our contention but that also is the observation – excuse me – of both the Eighth Circuit and the – both the majority and dissenting opinion, as well as the opinion of the unanimous State of South Dakota Supreme Court. And then, add into that, as a method of telling us what everybody understood at the time that this Act was passed, pursuant to the agreement with the Yankton Tribe, was what I will call the immediate wholesale settlement of the area by homesteaders, or what the District Court referred to as the rapid settlement and the loss – the quick loss of Indian character in this area, which would suggest, at least to the State, that that would suggest disestablishment.

We also would submit to you that additional –

QUESTION: May I ask you, General Barnett, you use the word "disestablishment," but as I read particularly Judge Magill's decision, his dissenting opinion, he's very careful to speak always about

diminishing. And you seem to use those words as though [5] they mean the same thing.

MR. BARNETT: Your Honor, I believe that diminishment probably should be read to suggest a case more like Rosebud v. Kneip, where the Court said that as to several counties, the reservation was disestablished, but it still left one county with a compact square of reservation. And so there was still actually 18 U.S.C., 1151(a)-type reservation country out there, but it was diminished in size.

The case that we have here today – and I think the parties would agree – that the case we are doing today is disestablishment, just like the DeCoteau case, where the Lake Traverse Reservation was found by this Court to be disestablished, meaning there was still no 1151-type – 1151(a)-type reservation out there.

I – I might add, Your Honor, that diminishment and disestablishment at one time were probably not terms of art. In our view, they are now. And we are, I think, today here litigating disestablishment.

QUESTION: Even though Judge Magill said that he thought that the District Court erred in holding that the reservation had not been diminished?

MR. BARNETT: Yes. And I – and I do not believe, from reading all of Judge Magill's opinion, that he's trying to suggest that some 1151(a)-type reservation [6] still existed after 1894. I think, to be

honest, I would suggest to you that – that he was probably using diminishment and disestablishment interchangeably, and that has happened in the history of the – of the court system in other cases as well.

Returning for a moment, if I may, to the settlement history that took place out there – and the reason I bring it up is because this Court, on other occasions, has looked to the settlement history immediately after the passage of the Opening Act to help it determine what did everybody understand at the time. And in this case, as was suggested by the Court of Claims in 1980 – or as was found by that Court – within 3 years of the opening of this reservation, more than 100,000 of these opened acres had been sold. Within 5 years, 90 percent had been sold.

And as you will see at joint appendix 475, by 1913, in addition to the ceded lands which had been put up for settlement by the homesteaders, more than two-thirds of the allotted lands left to the Indians in 1894 had also been sold. And so –

QUESTION: General Barnett, was the particular tract of land that we're concerned with in this case part of the land that was restored to the public domain by the 1892 agreement?

[7] MR. BARNETT: Yes, Your Honor, we do contend that it was restored to the public domain. And by way of explanation, at the time of trial, 90 percent of all of the land in what we call the disputed area, 90 percent of that former reservation area was

in non-Indian hands. Which has been something that the Court has noted in its prior cases. And more than two-thirds, or 68 percent, of the population was non-Indian, as found by the Federal census.

QUESTION: So this parcel was not allotted land that was later alienated?

MR. BARNETT: 168,000 acres of the 430 – 168,000 were immediately ceded to the Federal Government, and then, then, as I said, began a rapid process of sale. And then the allotments, which were the balance of the 430, were, in large part, sold in the ensuing years. In about the next 15 or 20 years, a great majority of the allotments were sold.

QUESTION: Yeah, we were asking about this particular tract of land.

QUESTION: Yes.

QUESTION: And its history. This – this is the site of a proposed waste site or something.

MR. BARNETT: Oh, okay. I'm sorry.

QUESTION: And we're talking about a particular [8] tract of land.

QUESTION: Correct.

MR. BARNETT: Excuse me, Your Honor.

QUESTION: Now, was that land that was directly restored to the public domain? Was it allotted

and then later resold? What was the history of this tract?

MR. BARNETT: It was – it was – it is now and was at the time of trial fee land. It was issued by a government patent, issued by the Federal Government. I don't know the exact year, but I'm going to suggest in the late 1800's. And I can find that fact in time for rebuttal. But it was issued in – in fee patent by the Federal Government, and used actually the words "public domain" in that fee patent. And so –

QUESTION: What – that was before the 1890 – 1892 agreement, then?

MR. BARNETT: That I cannot answer. I'd be guessing, Your Honor. I do have that information, but I don't have it at my fingertips.

QUESTION: The Respondents rely on a savings clause in Article XVIII, is it?

MR. BARNETT: That's correct, Your Honor.

QUESTION: Are you going to address that?

MR. BARNETT: Yes, Your Honor.

QUESTION: Because it is language that is [9] different than that which we have seen in other treaties or agreements.

MR. BARNETT: Yes, Your Honor.

The – as we look at Article XVIII, it seems to the State that the one thing that you cannot do with

Article XVIII is read it literally. Because if you read it literally, in the strict literal interpretation, then it says that nothing in this Act in effect – or in agreement – in 1892 actually happened. The sale did not happen. The white homesteaders could not move in.

Part of the 1858 treaty forbade settlers or other whites from coming onto the reservation, with certain narrow exceptions. And that was in 1858.

By contrast, in the 1892, and in the Act ratifying it, the exact opposite purpose was there, that – that we are going to have whites come in and settle this area. And – and so, when we try to interpret what Article XVIII says, I think, first, that the – and I suspect the parties would even agree – it cannot be read literally. Because then you get absurd results.

The second thing that I would observe about Article XVIII is that if you read the first sentence of Article XVIII, it says: Nothing in this treaty abrogates the 1858 treaty – or nothing in this agreement.

If that's true, all the rest of Article XVIII is [10] surplus. If you go to the first phrase in the second sentence, it repeats that phrase, that – that essential statement. And if that's true, what came before and what came after is surpluses.

And so it seems to me that it can't be read literally. And – and that takes us to the next point, which is, how does the Federal Government propose to us that it should – or to you – that it should be read? And if I understand their argument in their briefs

correctly, they're suggesting that you need to read into Article XVIII the phrase "not inconsistent."

And they go to Article I and II and suggest that I and II is not really a cession and sum certain, contrary to its express language, but is – and, in fact, I would submit to you they are asking you to read out cession and sum certain. And take that out, and then construe what is left.

And – and I don't think that that is the appropriate way to handle it. And, in fact, I would – I would suggest that the Klamath case had an analogous situation, where there was a savings clause in that case, which suggested that nothing in the – in the more modern agreement was to – was to take away rights they had preserved in the past. But as the Klamath court pointed out, the later agreement constituted a cession and sum [11] certain, and that the Klamath Tribe could not silently preserve hunting and fishing rights through a general – the general language of a savings clause.

Now, I would also submit to the Court that when we look at 18, at the tail end of this agreement, or when you look at it – excuse me – I would suggest to you that it is important that that is not the operative language of the – of the agreement or the Act. And, in fact, I would – I would call your attention to the Hagen case, where the Court said that, in observing on the Solem case, observed that the use of the words "public domain" in the Solem case were not found in the operative language of the Act. And since they

were not found in the operative language, they had, I think, secondary importance.

Or as the Court –

QUESTION: Why – why isn't this in the operative language?

MR. BARNETT: In the 1892?

QUESTION: Right.

MR. BARNETT: Because I don't think they intended to disestablish – excuse me – I think they intended to disestablish, and I don't think that – that they intended Article XVIII to – to change what the terms or the operative intent of the Act were.

I think that Article XVIII was there to reassure [12] the Tribe that they would receive the monies and the claims that they felt were due them – the annuities.

QUESTION: Then why didn't they just say that and nothing else?

MR. BARNETT: Well, I think, as one justice said – or judge said – at the Eighth Circuit, lawyers repeat themselves. And I suspect that – that probably what was happening was the Indians were concerned that – that the Federal Government was not going to live up to its obligations, and particularly when they understood they were selling the – the remaining reservation that they had received in the 1858 treaty, it seems to me that a fair question that would have been in the Indians minds was: Are you

going to abrogate that portion of the 1858 treaty from which our annuities flow? And the answer would be: No, we are not going to abrogate the 1858 treaty, and you will get your annuities.

And, indeed, if you look at the report that the commissioner gave to the State of Interior, who then filed with the Congress, in 1893, what you will see is a – is a lengthy description in the record about what all of the Indians concerns were and how these were resolved in the various articles of the agreement. And so there was a long discussion about Pipestone Quarry and a long discussion about scout claims for Indians who had served [13] as scouts and felt they still had money owing. A lot of discussion about their concerns.

No discussion about preserving boundaries or authority, in the first place. And in the second place, when we come to – to what the negotiator is telling Congress the Indians feel about 18, it gets one sentence, and one sentence only in the record. And what he says is – with regard to 18, his comment is: The Treaty of 1858 is not abrogated and the Indians shall get their annuities.

And so that suggests to me that – that if the Tribe really did think and believe that they were going to preserve their boundaries and their authority, number one, that's a glaring conflict with the cession and sum certain language; and, number two, is completely unsupported in the congressional and in the negotiating record.

QUESTION: May I ask this question about Article I and – and also Justice Ginsburg's question of distinction between dis – disestablishment and – and diminishment. That when you say – when the sentence says they cede, and so forth and so on, their interest in and all the unalloted lands within the limits of the reservation – set apart – doesn't that kind of convey a message – I don't know – if you don't know the geography – that there's some un – unalloted lands [14] within the limits of the reservation to which this agreement applies and there's additional land in the – in the reservation that's unaffected by this?

MR. BARNETT: Well, I read that reference as a geographical reference.

QUESTION: Yes.

MR. BARNETT: And – and – and through – and the use of the phrase "within the reservation" –

QUESTION: Right.

MR. BARNETT: – does not suggest to us – given the fact that it's right in a cession and sum certain does not suggest to us that a reservation is going to continue. It is simply a reference to what area it is that we are ceding and disestablishing. And I would call your attention to the DeCoteau case, with the Lake Traverse Sissetons and Titowan Tribe, identical Article I and II, word for word. And it used the same phrase, "within the reservation." And yet

this Court held, as you know, that that reservation was disestablished.

And I would also submit to you, Your Honor, that – that this is consistent with what the Indians have understood for the first 100 years, as evidenced by their own constitutions, particularly the 1962 constitution, which tells us something about what the Indians felt. In 1962, the territory that they claimed – this is in your [15] joint appendix at 499 – the only territory they claim jurisdiction over in their own constitution was, quote, tribal lands now owned by the tribe, end quote. Which we think is a lot more consistent than what is –

QUESTION: But how do you – but how do you – what's your theory of how the reservation becomes disestablished? That is, I take it they cede 200,000 acres of unalloted lands. And you're arguing those lands are no longer within the reservation?

MR. BARNETT: Yes.

QUESTION: You're not – all right. They're subject to the jurisdiction of the State then?

MR. BARNETT: Correct.

QUESTION: All right. And the remaining 260,000 acres of allotted land?

MR. BARNETT: We are also arguing that –

QUESTION: Now, what is it that – that changes the status of the allotted land in your theory?

MR. BARNETT: I believe that we are adhering to the teaching of the DeCoteau case, where the DeCoteau case, at 420 U.S., 446, in footnote 2, talks about when you cede the authority, the governmental authority, that you have over an area – and – or, in this case, to use the exact language – cede all interest – with that goes the authority not just over the immediately ceded, but in [16] the entire region. And, indeed, in the DeCoteau case, the Court said that what was intended to be left by Congress was the allotted lands – the allotted and trust lands. And under the Pelican case and under 18 U.S.C., 1151(a), (b) and (c), what we know today is that when there is a cession and sum certain, the authority is lost.

QUESTION: See, the part that I'm having difficulty with is imagine a big square, A, B, C, and D, four subsquares within the big square.

MR. BARNETT: Yes.

QUESTION: Now, suppose that a particular treaty said, "We cede subsquares C and D. We keep A and B." Well, if that's what it said, wouldn't you think the reservation then consisted of A and B?

MR. BARNETT: We subscribe to the DeCoteau logic, that – that, I think, suggested that Congress' intent was that the cession means all authority –

QUESTION: So, if – in your view, if – if it's A, B, C, and D, and they say, We cede – we sell, cede, get rid of and absolutely never want to hear again of

subsquares C and D, you're saying, when they did that, they've also destroyed the reservation as to A and B automatically. And I – that's – that's odd.

MR. BARNETT: What was lost at the time was 1151(a)-type jurisdiction. And to go back to the Solem [17] case, the common notion at that time, in those years, was that tribal – tribal ownership was synonymous with tribal authority. And so, then, when lands went out of tribal ownership, they lost that authority.

QUESTION: But I'm thinking of the part that was left in tribal ownership.

MR. BARNETT: Yes. And – and – and my point, Your Honor, is that then, as those allotted lands are alienated, the Indian title becomes extinguished. To use the exact language of 18 U.S.C., 1151(c), the Indian title is extinguished. And at that time, under the DeCoteau case and under a long line of cases in the lower Federal courts, as well as, I think, the – the cases from this Court, then that is – that also loses its status as –

QUESTION: But they keep their tribal status as to the little bits that they keep, that they don't – see, what I'm driving at is I took – take it that Felix Cohen thought that they must have been left with at least some jurisdiction in respect to little bits of territory that they, for example, kept completely. And those are scattered throughout the whole area. And, therefore, it wouldn't be feasible to administer

little scattered bits, bit by bit. And, therefore, they must have intended to keep the whole area.

MR. BARNETT: Well, I think – and that's a [18] reference to the 1941 Cohen opinion – but let me observe that even Felix Cohen, as an advocate and as a, I believe, Acting Solicitor, even he did not base his opinion on Article XVIII when he – when he reviewed this. Secondly, the very next year, he offered the Perrin case as authority for the proposition that the tribes – that – that this was now no longer reservation land. And so that certainly was an indication.

But perhaps a better indication would be to – to look at how did the Federal Government and the Tribe view this very question. Because on all of those lands which were allotted and then later alienated – almost all of them by 1913 – we've been out since 1913 – or in all of those years – exercising jurisdiction, without contest or objection from the Tribe until about 3 years ago.

And then you look at Felix Cohen issued his opinion in 1941. And if that was not a wake-up call to the Federal Government and the Tribe that maybe you've got more jurisdiction on those lands which once were allotted, certainly Congress' enactment in 1948 – if this was still all reservation, both the original cession land and the allotted lands that were alienated – that should have been a wake-up call. And still we did not see the Federal Government.

And even as late as 1985, the Federal Government [19] was arguing in the Eighty Circuit Court of

Appeals that – or suggesting – that this reservation in fact was diminished. So –

QUESTION: Help – help me out, will you, on – on the – on the – the – the relationship between the cession language and the particular parcels involved. The cession language clearly referred to the lands conveyed to the United States, which were then later conveyed out by the United States. Did the cession language refer to – to lands which had already been allotted but which were not at that point, in 1892, conveyed to the United States?

MR. BARNETT: It – it used the words "all unalloted land." Now, there are

QUESTION: So, as to the allotted land, the cession language did not apply?

MR. BARNETT: I think it has an effect. It applies –

QUESTION: But it didn't apply. I – I don't – I just want to make sure that I understand the way the terms were used. Then we get to the legal effect of it. I take it that in terms of – of the – the literal statement made, the language employing the term "cession" did not, by its terms, apply to – to lands which had previously been allotted?

MR. BARNETT: I would agree.

[20] QUESTION: So that your argument there is not that the jurisdiction was lost by the cession language as such, but by the application of

some other rule – and I think it's the some other rule that I'm not clear about.

MR. BARNETT: Well, I think it's a reflection, Your Honor, of when we look at 1151(a), (b) and (c), those are a codification of law that had been developing ever since the – I believe the Bates v. Clark case back in the 1870's. And I think what the courts have said as they've looked at this question is, is that, did Congress intend to disestablish the reservation? And if it did intend to disestablish the reservation, then the courts have been uniform, they have been uniform in concluding that not only is there a loss of authority or jurisdiction as to the lands immediately ceded, but they are also taking the position – and this is consistent with the philosophy of the Allotment Act, the – in the Yakima v. Yakima Indian Nation case – the court has expressed, in Justice Scalia's writings – talks about the policy of the Allotment Act.

QUESTION: Mmm – hmm.

MR. BARNETT: And the – the – and I think you have to read that within – or as a historical context throughout the late 1800's and into the first decade of the – of the 1900's. And that is that the – the – the [21] goal and the purpose of these cession and sum certain cases, the goal of Congress was to erase the boundaries –

QUESTION: Oh, I will grant you that. I don't think there's any – any doubt in – at least in my mind about that. But I take it that the – the – the

construction that you are arguing for would work this way: Let's take Justice Breyer's example and – and instead of having the four quadrants, A, B, C, and D, let's assume that there was 1 acre in quadrant D. And the Tribe had made a – an agreement with the United States, using the same language here, ceding the 1 acre. I take it on your argument the entire reservation would be disestablished as a legal consequence of that; is that correct?

MR. BARNETT: I would – that would certainly be a more difficult case.

QUESTION: But that, theoretically, would be the application of your rule?

MR. BARNETT: Theoretically – yes, theoretically, that's correct, if – and I – and I – I have to add an "if," based on the Hagen teaching – which is look at all of the circumstances. If, in the operative language of the Act, which was the case here, "cession and sum certain," if that language is used, and if from all of the other circumstances that apply – the rapid settlement, the uptake of jurisdiction –

[22] QUESTION: Yeah, but this would have been rapid settlement of 1 acre.

MR. BARNETT: Okay. Well, and so yours is a more difficult case, obviously. This was only –

QUESTION: Well, can – can I ask about this hypothetical.

I assume this 1 acre is the only acre that is – is not previously allotted. All the rest is allotted lands. Is that how you understood the hypothetical?

MR. BARNETT: Yes.

QUESTION: Okay. So – so the Tribe has given away all of its unalloted portion in the reservation?

MR. BARNETT: Yes. And – and, to go back to the –

QUESTION: But the allotted portions are to members of the Tribe?

MR. BARNETT: Understood.

QUESTION: Yeah.

MR. BARNETT: Yes, Your Honor.

And – and to go back to what DeCoteau tells us, that that cession and sum certain is conveying governmental authority, and it is eliminating the boundaries in the entire quadrant. And what is left is the allotments which – and the dependent Indian communities. And so we are not contesting today that we [23] have jurisdiction over that 9 percent. We're suggesting we have 1151(a) jurisdiction over the 90 percent that is not in Indian hands.

QUESTION: Well, I'm troubled by why we should answer that broad question. We're dealing with one waste site on some kind of tract of land. And you can't even tell us the history of that particular

tract. So, I mean, why doesn't – why don't we just answer the question as to that and nothing else?

MR. BARNETT: To the best of my knowledge, Your Honor, that tract has never been allotted lands. But to say – but I would have to respectfully disagree with the Justice that we are not simply arguing over that one tract. Because that part is – whether or not there is going to be a site there is not on appeal here. What's on appeal is the District Judge's opinion that there is still – that – that broad boundaries are out there which create 1151(a) jurisdiction in the entire region, including the 90 percent.

And – and let me just close so I can reserve a little bit of time. I would suggest to you this: If the Federal Government and the Tribe read this Act the way they do now, where have they been? If it could be easily and reasonably read that way, why wasn't it?

Thank you.

[24] QUESTION: Thank you, General Barnett.

Mr. Abourezk.

ORAL ARGUMENT OF JAMES G. ABOUREZK ON BEHALF OF THE RESPONDENTS

MR. ABOUREZK: Mr. Chief Justice, and may it please the Court:

In the 1858 treaty – and I'd like to go back to that, if I may – the Tribe gave up 11 million acres of land to the United States Government. These were enormous property rights and sovereignty rights that they bargained away in exchange for a 430,000-acre homeland, a reservation that they believed was going to be their permanent home in perpetuity. They – they also got annuities. They got some cash – I think $1.6 million.

But this 430,000 acres was their land that they wanted to retain the Indian character. They wanted to retain this land forever. And when the government came along, after the allotments in 1892, and said we want to buy what's left over from you, the surplus lands, the Tribe held on so dearly to this 1858 treaty, to their boundaries, to the reservation and their annuities that they refused actually to sign the 1892 agreement until the Federal Government said, okay, we're going to give you Article XVIII, we'll give you school lands, we'll give you the liquor provision that you've asked for.

[25] These were things demanded by the Tribe. And they got them. And, as you know, they were handed a form agreement by the government, the Tribe was, that had actually six – six articles in it. And everything else was tagged on – in – insisted upon by the Tribe.

Now, the State has been arguing disestablishment and diminishment. And they use the terms interchangeably. They have in their briefs. And what

they're really asking for is not just diminishment, which would be the case Justice Breyer brought up, that would be carving out a discrete portion or a discrete parcel of the reservation and saying, okay, this is now no longer here, so the reservation boundaries are diminished. No, what the State is asking for – and I think it's pretty clear in their – in their writings – is termination, total termination of the reservation altogether.

QUESTION: As far as this parcel at issue here is concerned, does it make any difference?

MR. ABOUREZK: In what – in what regard, Justice Scalia?

QUESTION: Even if it is only a diminishment rather than a disestablishment, wouldn't the parcel here be in the portion that was diminished – that is, it was taken away from the Tribe?

MR. ABOUREZK: Yes, it would be. Although the [26] reason you can't really argue diminishment in this respect – and that's why they don't really say diminishment – is that the parcels were checkerboarded all the way – the allotment parcels are checkerboarded all the way through, as well as the ceded portions. They're everywhere within the southern half of Charles Mix County.

QUESTION: So then it has to be disestablishment or nothing?

MR. ABOUREZK: Or nothing. That's what they're asking for. Because you can't really diminish that reservation.

QUESTION: Well, but then do you agree with the theory that it has to be – you would say nothing and they would say disestablishment?

MR. ABOUREZK: Precisely.

QUESTION: Why – why couldn't you, even if it was a checkerboard?

MR. ABOUREZK: Well, it would –

QUESTION: Why do we have to reach that question –

MR. ABOUREZK: I think it was one – this Court at one point said that if that were the case – first of all, it's looked upon with disfavor; but, secondly, they would say law enforcement people would have to have a map [27] to decide who they can arrest and where. I think it would be very difficult to leave a checkerboard reservation.

QUESTION: Do you – do you think – what is the practical consequence of the – of – of this case, one way or the other? That is, I take it there are a lot of towns in this area that are not Indian towns. They're – they're – they're all the descendants of the settlers or whatever. So there are quite – there are several towns in there, and people have been treating it as part of South Dakota.

Now, if you win this case, what happens to those towns? We're not talking about giving land back to the Tribe. We're talking about jurisdiction and what laws apply, is that right?

MR. ABOUREZK: Yes. Absolutely.

QUESTION: Yes. So how does it work? Do the towns suddenly discover they don't have judges, that they don't have – how does this – what – what turns on this?

MR. ABOUREZK: Well, that would never happen.

QUESTION: Yeah.

MR. ABOUREZK: First of all, the Federal Government and the Tribe have been exercising jurisdiction ever since the Eighth Circuit opinion. And the State now cannot arrest Indians on Indian land within the boundaries of the reservation. If we were to win this – if the [28] Tribe were to win the case, really nothing would change. It would be such a minimal change that it wouldn't –

QUESTION: What is the jurisdiction in respect to those who are not members of the Tribe who are in this territory? Do they get to vote? I mean, who do they vote for?

MR. ABOUREZK: Oh, of course, yes. Yes.

QUESTION: Do they have town councils?

MR. ABOUREZK: Yes.

QUESTION: What government runs –

MR. ABOUREZK: There's a county government. There are – there are city govern – town governments in each one of these towns.

QUESTION: Well, isn't this –

QUESTION: Under the –

QUESTION: – if – if you would win the case, just continuing with Justice Breyer's line of examination, would the Federal Government not then supplant the State with reference –

MR. ABOUREZK: Only – only within the boundaries of the reservation and only with regard to Indian defendants in criminal cases.

QUESTION: So in the non-Indian defendants, in the – in the ones – people, I'm thinking, who are not Indians, they have towns and there are some laws.

[29] MR. ABOUREZK: Yes.

QUESTION: And rules. And – and there – there are like judges and mayors and – what rules apply to elect all those people? Who – who –

MR. ABOUREZK: The normal rules of South Dakota –

QUESTION: Of South Dakota?

MR. ABOUREZK: South Dakota.

QUESTION: Why do South Dakota law apply if it's within the bounds of a reservation? Is it that in reservations normally the law of the State applies?

MR. ABOUREZK: Sorry, say that last word again?

QUESTION: Why do – is it – what – I'm just missing a very basic hornbook point probably. But in a reservation, where there are groups of people who are not members of the Tribe, what law applies to them?

MR. ABOUREZK: South Dakota law.

QUESTION: The State laws apply?

MR. ABOUREZK: That's right. The only exception, Justice Breyer, is if a non-Indian were to commit a crime against an Indian within the boundaries of the reservation, the Federal courts would take jurisdiction over that.

QUESTION: Well, what – what about civil jurisdiction, Mr. Abourezk? We had an A-1 Contracting [30] case here last year, where the – there was debate as to whether the tribal law and tribal courts would rule on an – on an automobile accident. Now, if – if the Eighth Circuit is upheld here, won't that same condition obtain on the Yankton Sioux Reservation?

MR. ABOUREZK: Yes. The – the non-Indians would not be allowed to use the court unless

they would both submit to its jurisdic – the tribal court – unless they submitted to its jurisdiction. And I think the only difference –

QUESTION: That was as a result of the decision that we made in that case. But I'm looking at the – this is a brief that was filed by a number of cities. And they paint – this is City of Dante, et cetera – they paint, at pages 8 to 12, a – a picture of massive confusion. And you are now standing here and saying it's not so; State law will still apply and there won't – won't be anything different.

QUESTION: I thought we were arguing precisely about whether tribal law of State law applies, and – and, hence, whether this land can be used for this purpose or not. If it can under State law but can't under tribal law. And you're telling us it doesn't make any difference, State law applies anyway.

MR. ABOUREZK: No, it will make no difference – [31] minimal difference to the non-Indian population.

QUESTION: Well, then – then why was this permit denied?

MR. ABOUREZK: The permit – the permit wasn't –

QUESTION: And – and why – why would the permit have been denied if – if – if you're correct?

MR. ABOUREZK: No, the permit wasn't denied. It was – first of all, they brought a – it was an

administrative hearing in the State – in the State administrative procedures, asking for a permit from the State of South Dakota.

QUESTION: Well, but you take the position that the Tribe has authority to determine whether or not the plant will be located here.

MR. ABOUREZK: No. No, we don't take that position. The position we took was that because the State could not permit on the reservation, that the EPA regulations must be followed then instead of the State regulations, which are weaker than EPA's regulations. That was our –

QUESTION: So Federal law rather than State law would govern?

MR. ABOUREZK: Yes. Because the Tribe had not gotten any authority to – to regulate landfills within [32] the reservation.

QUESTION: And is the reason that State law would apply to the governance of the cities and towns in Justice Breyer's example, is the reason for that that there is no supplanting Federal law?

MR. ABOUREZK: No. The reason is decisions by this Court, that provide for different kinds of jurisdiction over different people, whether Indians or non-Indians.

QUESTION: I see.

QUESTION: Could – could I ask you how you – how you respond to what I understand to be the

– what should I say – the philosophy of – of – of the Petitioner here. As I understand it the claim is that – that when all of the unalloted lands in a reservation are ceded, and there is nothing left in the reservation but allotted lands, it is to be understood that the reservation is thereby closed down.

Now, it would be inconsistent with that, I suppose, if there were indeed numerous reservations which consisted of nothing but allotted lands, in which the Tribe had no – no communal land left at all. It had all been allotted. Are there reservations like that?

MR. ABOUREZK: I don't know of any, if there are. I think there is always –

[33] QUESTION: So it – it may – it may be – it may be true that – that the way people thought at the end of the 19th century, if the Tribe, as a tribe, doesn't own anything in this whole area, there can't be a reservation. You can't have a reservation composed only of lands that are owned by individual Indians.

MR. ABOUREZK: Well, Justice –

QUESTION: All of which can be – can be alienated to non-Indians. You have to have at least some – some basic component of – of tribal land that's owned by the community of the Tribe.

MR. ABOUREZK: Well, there is in this case. Right now, the – I think the Eighth Circuit did a little research on its own, independent research,

showing that there were anywhere from 32 to 44 percent of Indian population in the county within – within that reservation. So there's a substantial –

QUESTION: But that doesn't go to tribal lands?

MR. ABOUREZK: Pardon?

QUESTION: That doesn't go to whether or not they are tribal lands, the fact that there may be Indians living there. I mean, are there tribal lands?

MR. ABOUREZK: Oh, yes, Your Honor. Right now, about 10 percent. As the Attorney General said, about 90 percent have been sold off – of the ceded lands – by - [34] and were purchased by other people that are not – not any longer tribal – or Indian lands, yes.

QUESTION: But – but are you taking the position, to put it crudely, sort of the mirror image of the one that – that I was – I was attributing to the State? I said, you know, if they – on the State's theory, if they cede 1 acre, they have, in effect, terminated the jurisdiction over everything. And – and you are saying, I guess, that as long as they retain 1 acre, the entire reservation, as a jurisdictional entity, as opposed to a – a property title –

MR. ABOUREZK: I would say something totally different –

QUESTION: – retains. Okay.

MR. ABOUREZK: – Your Honor. What I would say is that Congress intended, by virtue of leaving in Article XVIII in the – in the 1894 statute, by leaving that in, they certainly intended to continue tribal governmental authority within the boundaries of the reservation. And if you read the entire agreement –

QUESTION: Why pick out that? Why pick out that one element from the whole treaty as the one element that – that Article XVIII preserves? If you read it literally, it – it just takes away everything that the whole treaty gives.

[35] MR. ABOUREZK: No. It continues the treaty, Justice Scalia. It doesn't take away any –

QUESTION: Oh, the 1858 Treaty, it continues.

MR. ABOUREZK: Yes.

QUESTION: I'm talking about the 1892 Treaty. If you read Article XVIII literally, it says this Treaty shall have no effect.

MR. ABOUREZK: Well, it doesn't really say that. Well, I think – I think a fair reading –

QUESTION: Can you tell me why it doesn't say that? I mean, it – it – it says what?

MR. ABOUREZK: I think –

QUESTION: Nothing in this agreement shall be construed to abrogate the 1858 Treaty.

MR. ABOUREZK: Yes.

QUESTION: And everything in the agreement abrogated one thing or another in the 18 – the whole purpose of the agreement was to abrogate some elements of the 1858 Treaty, wasn't it?

MR. ABOUREZK: Respectfully, there's only one change made in the – between the 1858 Treaty and the '94 agreement, where there was a conflict. That – and section 10 of the Treaty, in 1858, said that white people – they didn't use the word "nonIndian," they just said white people in those days – cannot enter this [36] reservation and cannot reside here. So that's the only conflicting portion.

So if you re – with statutory construction, you passed a statute in 1894 –

QUESTION: But isn't that a rather major – just a whole change in the concept, from this is a reservation reserved for the use of Indians to a concept of we want the white men to come in and work side by side for – one is preserving a culture and the other is trying to break it up and assimilate it into another culture. It seems to me that these two documents are totally at odds.

MR. ABOUREZK: Oh, I don't – I don't agree with that, Justice Ginsburg. Because if – if you read the whole entire treaty and the whole entire 1894 statute, I think it clearly shows that – that the whites – they could sell land to the non-Indians and non-Indians could come and settle.

In fact, if you read the legislative history and the report of the commissioners who negotiated it, they say – they told the Indians that we would like whites to come in and show you how to farm and their upstanding character – moral character, et cetera, et cetera. And that's what we would like to do. And the Indians bought that. And they said, but they still wanted to maintain the Indian character of their reservation. Which is how I [37] read Article XVIII to mean. And that's – of course, that's how the two lower courts read it as well.

And you take the – the cession and sum certain language, which is – in my view, it's just boilerplate in all of those agreements –

QUESTION: But - but this Court has said it's nearly irrebuttable.

QUESTION: That's what Solem said.

MR. ABOUREZK: No, Solem said if you take those two, they're almost - or nearly – Hagen said "nearly." Solem said "almost irrebuttable presumption." But if you read the entire agreement together, I say the presumption falls upon – the presumption is that the Indians retain the reservation and it's up to the State to rebut –

QUESTION: But then you – must – mustn't you – mustn't you, if you're taking that position, say, "Court, you were wrong; you should qualify or even overturn your precedent"? Because the normal understanding of an almost irrebuttable

presumption is it takes a whole lot -- not something that ambiguous – ambiguous.

MR. ABOUREZK: Well, if it is ambiguous, it should be decided in favor of the Tribe, in any event. According to this Court –

QUESTION: But if you say – if we're faced with [38] something ir - almost irrebuttable and something that's kind of weak, it could mean one thing, it could mean another thing, why does the – the part that's uncertain –

MR. ABOUREZK: Well –

QUESTION: – dominate what we have said is a very strong presumption?

MR. ABOUREZK: Justice Ginsburg, if you read the entire agreement and the statute of 1894, what my position is – our position is that the presumption is in favor of maintaining the reservation boundaries because of what Article XVIII, Article XVII, and the school –

QUESTION: Then the presumption that's created by the cession and sum certain clause is rebutted in your view?

MR. ABOUREZK: It's not only rebutted, but it shifts – the burden of proof then shifts to the State or the people trying to abolish the reservation. And I don't think they've met that burden.

QUESTION: But don't you agree that there are various inferences that can be drawn, say,

between Article XVIII and Article I and II, that it isn't just crystal clear? And it seems to me there, as Justice Ginsburg says, if – if you – unless you're attacking what we said was the test in Solem, that – where you have a cession [39] for a sum certain, there's an almost insurmountable presumption, you have to come up with something more than just one way of reading a treaty as opposed to somebody else's reading, either – either of which is plausible.

MR. ABOUREZK: But you also said in Solem that there must be substantial and compelling evidence in order to disestablish or diminish a reservation. And what I'm saying, Your Honor, is this: That the – the evidence is not there. The State has not met its burden to – it doesn't show any substantial – it doesn't show any –

QUESTION: but the language in Solem suggests it meets its burden of – when it says there's a cession of land for a sum certain. Which they're certainly is here.

MR. ABOUREZK: If that's all there were. But there is more. And I mean more by Article XVIII.

QUESTION: Yes. But that more would then go to rebutting the almost in – insurmountable presumption. I – I just question whether you have that much more.

MR. ABOUREZK: Oh, I – well, of course, our position is that we have an awful lot more.

QUESTION: Right.

QUESTION: I'm – I'm still curious, Counsel, why you don't take the position that the 1894 Act might have diminished the reservation but not disestablished it entirely?

[40] MR. ABOUREZK: Well, we take that position simply because it's not practical to – to diminish –

QUESTION: You don't take that position, do you?

MR. ABOUREZK: We don't really, because it's not practical. You just can't do it because –

QUESTION: Although you said there are some tribal lands left.

MR. ABOUREZK: Yes.

QUESTION: But they also are checkerboarded, I take it?

MR. ABOUREZK: Yes, they are.

QUESTION: How – how did they ever get there? If – if all of the unalloted land was ceded and all of the land that was left is allotted to individual members of the Tribe, how did it come about that there is still some tribal lands?

MR. ABOUREZK: That there is still some?

QUESTION: Tribal lands.

MR. ABOUREZK: Well, they're owned by individual Indians.

QUESTION: So these are all allotted lands, in other words?

MR. ABOUREZK: Yes. Yeah. And there – there are some tribal lands, but mostly it's individual –

QUESTION: What other tribal lands? I mean, [41] that's crucial to me. I thought all the tribal lands, all the communally owned lands were given to the United States. That's – that's certainly what this –

MR. ABOUREZK: No. No.

QUESTION: No?

MR. ABOUREZK: Your Honor, what – what happened was there were – the allotments were over 200,000 acres that were allotted out. What was left over was 160-some-thousand acres. That's what the government came along and bought in 1892.

QUESTION: Right. All of the unalloted lands, which was the only portion of the reservation that was still held by the Tribe rather than individual Indians. Right?

MR. ABOUREZK: Yes.

QUESTION: Okay.

QUESTION: So that there were – there were no tribal lands retained in 1892?

MR. ABOUREZK: Yes, there were. But –

QUESTION: Well, I thought – then I don't understand your answer to Justice Scalia.

MR. ABOUREZK: I must have misunderstood his question. But there are – there were tribal lands in 1894. But most of them are individual Indian allotments, owned by Indians.

[42] QUESTION: But –

QUESTION: But if – if you distinguish between individual Indian allotments and, quote, tribal lands, are – are you saying there are some tribe – what you call tribal lands that are not individual allotments?

MR. ABOUREZK: Yes, very – not very many – not very many acres, but there are. Yes.

QUESTION: And some of them have been in the Tribe's possession since before the 1892 Treaty?

MR. ABOUREZK: There were all in the Tribe's possession prior to 1892. Then –

QUESTION: But the – the – the land – the – the communally owned tribal land was owned by the Indians and so held before 1892 and have been held continuously to the present day; is that correct?

MR. ABOUREZK: No. No. All of the lands – all of the 430,000 acres were communally owned until the allotments –

QUESTION: Right.

MR. ABOUREZK: – around – and then – then what was left over, in 1892, the government purchased. That was 160-some-thousand.

QUESTION: So when the government purchased, there were no communally land – owned lands, tribal lands, retained by the Tribe as such? That's –

[43] MR. ABOUREZK: Well, only a mile square. There was a mile square they retained for their headquarters, et cetera, et cetera.

QUESTION: Okay.

QUESTION: Thank you, Mr. Abourezk.

MR. ABOUREZK: Thank you.

QUESTION: Mr. – who do we have here? Ms. McDowell.

ORAL ARGUMENT OF BARBARA B. MCDOWELL ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

MS. MCDOWELL: Mr. Chief Justice, and may it please the Court:

To start with last things first, we'd like to deal with the jurisdiction over the reservation area subsequent to 1894. One can find in the record annual reports from the superintendent of the Yankton Reservation, from 1895, 1896 and so forth, to 18 – to

1906, which I believe is the last report in the record – those reports consistently refer to the reservation as a continuing entity. It's interesting that it doesn't demonstrate any significant change at the time of the opening. There's a notation that the reservation was opened, but there is nothing to suggest that there was a major change in the situation on the reservation at the [44] time.

QUESTION: But there's nothing in there, I take it, to suggest that this kind of jurisdiction was being exercised over either allotted lands or the lands that were conveyed in 18 – or under the – under the 1892 agreement?

MS. MCDOWELL: The record is unclear as to whether the State or the Tribe or the Federal Government was exercising jurisdiction over the allotted lands at the time. It appears that the only prosecution that is cited from the early era, one in 1895, may well have been on Indian allocated lands. It does not appear clear from my reading of the record.

More significantly, however, the exercise of criminal jurisdiction by the State was not inconsistent at the time with continued reservation status, as the Court noted in the Yakima case. At the time, it was thought that Indian character of the land went with Indian ownership. And it was also thought that once an Indian received an allotment, under the Dawes Act, the Indian immediately became a citizen of the State and subject to its plenary jurisdiction. That was

only changed in 1906, which was some time after the Act at issue here.

QUESTION: A theory which is beautifully in accord with the State's notion that everyone would have [45] assumed that if there's nothing left in a reservation but allotted lands, there's no reservation left.

MS. MCDOWELL: Oh, that's a theory that this Court has subsequently rejected over the last 35 years.

QUESTION: But it fits very nicely with what you say to be the – the – the – the understanding, that – that you can't have a – the reservation went with – with Indian ownership.

MS. MCDOWELL: Oh, the Court has acknowledged that in a number of other cases, including Solem, that at the time, the understanding was that Indian status was a property status, but that Congress disabused everyone of that notion in 1948, and that when we are deciding these disestablishment and diminishment issues, we are looking at reservations as they have been considered after '48, and not as they may have been considered 100 years ago.

QUESTION: Well, how – how – what is the normal now? I take it now differently from before 1906. Imagine a reservation of 50 square miles. On one of those square miles live a group of people who are not Indians, who own their land in fee, and who

bought it from the Tribe. Now, what law governs? The law of the State governs those people? I know the tribal land does not govern them. So far, it seems to me from what I've looked up, Federal law governs.

[46] MS. MCDOWELL: State law governs them except in some particular instances that this Court has spelled out.

QUESTION: Why does State law govern? Is it that the Federal Government has somehow, through law, statute or regulation, brought in State law?

MS. MCDOWELL: No. It's because the – I understand it's because the State has plenary jurisdiction over its citizens, wherever they reside.

QUESTION: All right. So, in other words, these towns that are upset – I don't understand they're upset, or maybe they shouldn't be upset, because nothing is going to change for them?

MS. MCDOWELL: That's our position, that things should not change –

QUESTION: Then why is it – I'm back at Justice Kennedy's point – why is it that there's some argument here about building a – some kind of thing in this – waste disposal or what it is – if the State law governs the same as it would if it were not within the reservation?

MS. MCDOWELL: This was a – a particular issue of the EPA's authority to delegate primary

supervision of landfills to the State. And under that permitting authority, the State excluded Indian reservations, as I understand it.

[47] But as a general matter –

QUESTION: What about – what about taxation?

MS. MCDOWELL: As a general matter, the State may tax its citizens on the reservation. Certainly, it can tax the non-Indian citizens just as it would, whether it was a reservation or not. It may also impose significant taxes, such as property taxes, on the Indians.

QUESTION: So in the absence of a Federal statute that explicitly distinguished between what happens on the reservation or not, everything stays the same, but for the Indians themselves, because they would have certain rights under tribal land, et cetera, if it is a reservation, throughout the reservation that they wouldn't have if it isn't; is that right?

MS. MCDOWELL: With a few limited –

QUESTION: Is that right?

MS. MCDOWELL: – exceptions, justice breyEr. if an indian commits a crime – if a – a non-Indian commits a crime against an Indian, if it's reservation land, then Federal law rather than State law governs the prosecution.

The State, in A-1 – this Court, in A-1 Contractors –

QUESTION: Well, could – could you enlighten us on what lands continued to be owned by the Tribe as such, [48] as opposed to specific Indians by way of allotment –

MS. MCDOWELL: It's –

QUESTION: – after 1892?

MS. MCDOWELL: It's my understanding that those lands were, for the most part, allocated to individual Indians. However, the Federal Government –

QUESTION: Well, I'm hearing a lot of "for the most parts," and "no," and "there's this other land," and "it's scattered." I mean, what is it? How are we to find it?

MS. MCDOWELL: Well, it appears –

QUESTION: How do we know?

MS. MCDOWELL: – from the record, which is not entirely clear, that there were some lands that were subject to allocation, but the actual allocations were not made until some time after 1894. There's also the mile square area –

QUESTION: But they've all been made – is there any land that was held continuously by the Tribe as such, as opposed to tribal members, since 1892?

MS. MCDOWELL: It's my understanding that there is this mile square area that's referred to –

QUESTION: A one square mile.

MS. MCDOWELL: But, other than that – although there are trust lands today that are held by the Tribe, [49] it's not clear that any of those lands were trust lands earlier. Perhaps Mr. Abourezk could clarify that, however.

QUESTION: Now, this – this is a totally checkerboarded situation?

MS. MCDOWELL: That's correct. And this Court –

QUESTION: That was certainly a factor that resulted in our thinking there was at least diminishment in the DeCoteau case.

MS. MCDOWELL: Well, the Court, in DeCoteau, found total diminishment. But that was a different case, in several respects, from this one. In the first place, of course, there was no savings clause preserving rights under an earlier treaty. In addition, the Court placed a lot of emphasis in DeCoteau on the negotiation history with the Tribe. There were a number of statements of tribal leaders, stating that we understand that the reservation is going to disappear, essentially, that we never understood that we would keep this reservation. Here there are no statements like that suggesting any kind of common understanding that the reservation was going to be extinguished as a result of the Act.

It's interesting that –

QUESTION: But do you – do you agree with both [50] counsel, it seemed to me, that the choice is either we accept your argument based on Article XVIII or there's a diminishment?

MS. MCDOWELL: That's correct.

QUESTION: That there is no such thing as diminishment applicable on these facts?

MS. MCDOWELL: That's correct. Diminishment seems to be limited to cases such as Rosebud, where there was a selling or a ceding of a part of the reservation, in so many words, as opposed to this sort of situation.

QUESTION: Didn't –

QUESTION: May I ask one –

QUESTION: Didn't Judge Murphy say she thought that – that the disestablishment was the rare thing and the diminishment the usual thing? It's a very –

MS. MCDOWELL: Well, disestablishment is very rare. This Court has only found it in one prior case, DeCoteau. And subsequently, in Rosebud, the Court suggested that disestablishment should be more difficult to find.

QUESTION: But –

QUESTION: Ms. – Ms. McDowell, can I go back? You said – you said Rosebud is different

because there it involved conveyance of only part of the reservation, in so many words.

[51] MS. MCDOWELL: Yes.

QUESTION: But this case involves a conveyance of only part of the reservation, in so many words. Namely, the part that was held in fee by the Tribe and not the part that had been allotted. Do you mean that Rosebud involved only a conveyance of part of the tribally owned portion of the reservation, in so many words? Is that what you mean?

MS. MCDOWELL: Well, the language of the statute in Rosebud says "We cede a part of our reservation." That kind of language wasn't used here. The language was, "We cede our surplus lands." There was no reference to selling off all or part of the reservation.

It should also be noted that the word "cede" didn't have any single –

QUESTION: Well, isn't it true that the –

MS. MCDOWELL: – settled meaning in the 19th century; that it was –

QUESTION: Isn't it true, though, that apart from the savings clause and the negotiating history, if you just look at the text of the document, the DeCoteau case is just like this, that if you have – let me just finish one question so you can comment – if you assume that if everything is allotted, you don't have a reservation. And if you then assume that all

that's left [52] is unalloted land, but then you cede your entire authority over the unalloted lands, what can be left?

I have trouble getting your explanation to that.

MS. MCDOWELL: Several responses. There are other differences between this case and DeCoteau.

QUESTION: I understand the differences: because of the history primarily in the absence of the savings clause.

MS. MCDOWELL: And there are other clauses that are in our Act here that were not in the Act in DeCoteau, such as the reservation of lands for Agency school and other purposes. That was not present in DeCoteau; it is present here.

QUESTION: Thank you, Ms. McDowell.

General Barnett, you have 2 minutes left.

REBUTTAL ARGUMENT OF MARK W. BARNETT ON BEHALF OF THE PETITIONERS

QUESTION: General Barnett, could you quickly advise us what the jurisdictional consequence of this -- of this case is?

MR. BARNETT: Well –

QUESTION: What does the State lose if – if you lose?

MR. BARNETT: I think we lose a vast amount of clarity, as we are standing – or, up until the District [53] Court opinion, jurisdiction in the 90 percent of this area that has gone out of Indian hands was –

QUESTION: What – what kinds of authority can you not exercise if you lose that you're exercising now?

MR. BARNETT: Well, obviously, if you were to hold that it is still a reservation in this entire area, it would have a big effect on criminal jurisdiction. And the best example I can give you is that if you were the victim of a crime out there on that 90 percent of that area, it's the difference between whether you call the sheriff down the road or whether you call the FBI office 120 miles east of there, in Sioux Falls, and leave a message on the machine.

Second –

QUESTION: It's criminal jurisdiction over Indians?

MR. BARNETT: Pardon me?

QUESTION: Criminal jurisdiction over Indians. Is there anything else? Is there anything with respect to non-Indians that you'd lose?

MR. BARNETT: Yes, I think there would be. You're on a reservation at that point, and I think there would be criminal aspects, because of 18 –

QUESTION: No, no, no. Forget criminal. I mean, is there any civil?

[54] MR. BARNETT: Yes, there would be.

QUESTION: What?

MR. BARNETT: Well, I think there are a number of holdings of this Court that suggest that – that if there is a reservation out there, the Tribe is going to have some rights of civil jurisdiction. And, indeed, in this case, when they first now started claiming that they have civil jurisdiction, they're in trying to contest fee land – fee land landfill that isn't even on trust land.

QUESTION: That's our Brendle case. The Brendle case.

MR. BARNETT: Suffice it to say, Your Honor, with the – and – and I'm trying to be brief to stay within my time – but suffice it to say that this Court is aware that there would be all sorts of ramifications that the Court has seen in prior cases in disputes over civil jurisdiction, A-1 being one place where we've had to litigate who's in charge.

Let me just clarify something else. In this Act, there was no tribal land base left. Yet there was a little reserve of Federal land, for the 1 mile square, but everything else was allotments. And so tribal communal ownership was over.

Secondly, there were savings clauses in Montana, in the Montana Crow agreements, and in the Rosebud [55] agreement. And it seems to me there is a hook in the argument that they're suggesting that a non-operative savings clause, with no specific language about preserving some authority and no contemporary history – my time is up. Thank you.

CHIEF JUSTICE REHNQUIST: Yes. Thank you, General Barnett. The case is submitted.

(Whereupon, at 2:00 p.m., the case in the above-entitled matter was submitted.)

187 (7) (7) (8)
FILED
MAY 9 - 2011

NOS. 10-929, 10-931, AND 10-932

In the Supreme Court of the United States

DENNIS DAUGAARD, GOVERNOR OF SOUTH DAKOTA, AND MARTY J. JACKLEY, ATTORNEY GENERAL OF SOUTH DAKOTA,
Petitioners

v.

YANKTON SIOUX TRIBE AND UNITED STATES OF AMERICA,
Respondents

SOUTHERN MISSOURI RECYCLING AND WASTE MANAGEMENT DISTRICT,
Petitioner

v.

YANKTON SIOUX TRIBE AND UNITED STATES OF AMERICA,
Respondents

PAM HEIN, CHARLES MIX COUNTY STATE'S ATTORNEY, ET AL.,
Petitioners

v.

YANKTON SIOUX TRIBE AND UNITED STATES OF AMERICA,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION

DARYL L. JOSEFFER
CANDICE CHIU
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500

PAUL D. CLEMENT
Counsel of Record
BANCROFT PLLC
1919 M St. NW, Suite 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

Counsel for Respondent Yankton Sioux Tribe

May 9, 2011 * additional counsel listed on inside cover

RICHARD A. GUEST
NATIVE AMERICAN RIGHTS FUND
1514 P Street NW
Suite D
Washington, DC 20005
(202) 785-4166

CHARLES ABOUREZK
ABOUREZK & ZEPHIER, P.C.
P.O. Box 9460
2020 W. Omaha Street
Rapid City, SD 57709
(605) 342-0097

QUESTION PRESENTED

Whether Congress manifested a "clear and plain" intent to disestablish the Yankton Sioux Reservation completely in 1894.

PARTIES TO THE PROCEEDING

Petitioners are Dennis Daugaard, Governor of South Dakota; Marty J. Jackley, Attorney General of South Dakota; Southern Missouri Recycling and Waste Management District; Pam Hein, State's Attorney of Charles Mix County; Keith Mushitz, Member of the Charles Mix County, South Dakota, County Commission; Neil Von Eschen, Member of the Charles Mix County, South Dakota, County Commission; and Jack Soulek, Member of the Charles Mix County, South Dakota, County Commission.

Respondents are the Yankton Sioux Tribe and the United States of America.

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INTRODUCTION

Following a decade and a half of litigation, this case is now reduced to a fact-bound, splitless dispute that concerns only about 37,000 acres of the original Yankton Sioux Reservation and that has far less practical or legal significance than petitioners suggest. Thirteen years ago, this Court held that Congress "diminished" the Yankton Sioux Tribe's reservation in 1894 by removing 168,000 acres from the 430,405-acre reservation. The Court further emphasized that multiple provisions of the 1894 Act evidenced Congress's expectation that the Tribe would continue to have a diminished reservation.

On remand, petitioners nonetheless advanced the extreme position that the 1894 Congress intended to disestablish the reservation completely. After exhaustively reviewing the historical record, the district court and the Eighth Circuit both concluded that Congress intended no such thing, and this Court denied review of that fact-bound ruling of both lower courts in 2000. There is no reason for a different result now.

Only two things have changed since 2000. First, the scope of the parties' dispute has narrowed as the lower courts have considered the reservation status of various parcels of land, with the Eighth Circuit recognizing just 37,000 of the original 430,405 acres as reservation. Second, realities on the ground have adjusted to the existence of a limited reservation, with the Tribe and other governmental officials cooperating to handle criminal law enforcement and other matters. Thus, practical experience over the past decade has only confirmed that the fact-bound

question presented, which implicates no clear split in authority, is not so exceptionally important as to warrant this Court's review.

Indeed, all parties appear to agree that the approximately 37,000 acres now at issue are "Indian country" whether or not they are also reservation lands. Because jurisdiction generally turns on whether land is Indian country, not whether it is also reservation, the question presented has relatively few practical consequences. While the continued existence of a reservation of any size has profound cultural significance to the Yankton Sioux Tribe, whose sovereign existence has been under siege in the courts for over a decade, it lacks exceptional importance for those outside the Tribe.

In addition to failing to account for the Indian country status of the affected lands, petitioners' arguments ignore the strict limits this Court has imposed on Indian authority over non-Indians in Indian country of any kind. Petitioners and their *amici* also focus on lands the Eighth Circuit pointedly did *not* hold to be reservation or other Indian country. Those strained efforts only underscore that the fact-bound question presented lacks any actual exceptional importance. And this Court need not speculate on that point; the experience of the past decade provides the best guide. Revisiting the question now would only destabilize the practical accommodations reached over the last decade.

STATEMENT

A. Historical Background

1. In 1858, the Yankton Sioux Tribe and the United States entered into a treaty which established the original boundaries of the Yankton Sioux Reservation and set aside a homeland for the Tribe and its members. Pet. App. 324.[1] The Tribe ceded to the United States title to more than 11 million acres of its aboriginal lands, and retained 430,405 acres in what is today Charles Mix County, South Dakota, as its reservation. *See id.* at 325.

2. Three decades later, Congress enacted the General Allotment Act of 1887, also known as the Dawes Act, ch. 119, 24 Stat. 388, *repealed in part*, Pub. L. 106-462, § 106, 114 Stat. 1991, 2007 (2000). That Act adopted a federal policy of breaking up Indian reservations into smaller pieces, and eventually opening them up for settlement by non-Indians, through the "allotment" of reservation parcels to individual Tribe members. The United States was to hold each allotted parcel in trust "for the sole use and benefit of the Indian [allottee]" for 25 years; after that time, the Tribe member would assume fee simple ownership of the parcel and could freely alienate it. 24 Stat. at 389. The Dawes Act further authorized the Executive Branch to "negotiate" with the Tribe to purchase, "in conformity with the treaty or statute under which

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[1] "Pet. App." refers to the appendix to the petition for certiorari in No. 10-929.

such reservation is held," the *unallotted* portions of the reservation on "just and equitable" terms. *Id.*

The United States allotted over three-fifths of the 1858 Yankton Sioux Reservation under the Dawes Act in a patchwork of scattered, noncontiguous parcels. That left approximately two-fifths of the reservation lands — 168,000 acres — unallotted.

In 1894, the United States reached an agreement with the Tribe, which Congress ratified in the Act of August 15, 1894 ("1894 Act"), ch. 290, 28 Stat. 286, 319, to purchase those unallotted acres for $600,000. *See* Pet. App. 337-351. A bare majority of the Tribe — 254 out of 458 signatories — ultimately consented to the sale, which whittled down the 430,405-acre reservation to approximately 262,300 acres of non-ceded, allotted lands.

The federal Commissioners who negotiated for the sale made clear that their specific objective was to arrange the purchase of the unallotted lands — and those alone. *Id.* at 232. They informed the Tribe that the government "'only wants you to sell your surplus lands for which you have no use.'" *Id.* at 222. The Commissioners then reported to Congress that the Yankton Sioux Indians "were not selling their whole reservation, but less than two-fifths of it," because "more than three-fifths of it would remain in their possession for such cultivation and improvement as Indians will give to it." *Id.* at 236. In negotiations with the Tribe, the Commissioners had also made numerous references to a "continuing tribal government." *Id.* at 233. The Commissioners further suggested that the Tribe

might "have this reservation organized as a separate county." *Id.*

The 1894 Act provided for the sale of the 168,000 acres of unallotted lands for payment of a sum certain. *Id.* at 229. Article XVIII declared that "[n]othing in this agreement shall be construed to abrogate" the 1858 Treaty establishing the Yankton Sioux Reservation. *Id.* at 347. Article XVII barred alcohol sales on "the lands ... ceded and sold to the United States" *and* "any other lands within or comprising the reservation of the Yankton Sioux." *Id.*

Other articles provided for ongoing tribal affairs on the reservation. Article V of the Act provided that certain funds be set aside for, *inter alia*, "schools and educational purposes," "courts of justice," and "other local institutions" of the Tribe. *Id.* at 341. Article VIII required the United States to set aside from white settlement 1,000 acres for "agency, schools, and other purposes" for the support of the Tribe. *Id.* at 342-343.

3. By the early twentieth century, the issuance of fee patents, often well before the 25-year trust period had expired, "left many Indians landless" and impoverished. *Id.* at 11. The federal government also acknowledged that its policy of encouraging assimilation had failed in light of the Indians' "cultural resilience." *Id.* The government therefore extended, re-extended, and then permanently extended the 25-year trust periods on parcels of the Yankton Sioux Reservation that it had continuously held in trust. *See id.* at 10 (citing Exec. Order No. 2363, Apr. 20, 1916; Exec. Order No. 4406, Mar. 30,

1926; Exec. Order No. 5173, Aug. 9, 1929); 25 U.S.C. § 462. In 1929, rather than opening the 1,000 acres of reserved agency trust lands to non-Indian settlers, Congress returned the lands to the Tribe and specifically prohibited their allotment. *See* Act of February 13, 1929, ch. 183, 45 Stat. 1167.

The Indian Reorganization Act of 1934 ("IRA"), ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461 *et seq.*), put an end to further allotment and extended the trust periods for outstanding allotments indefinitely. The IRA also authorized the Secretary of the Interior to acquire additional lands in trust for Indians and Indian tribes. Under the IRA, the federal government has taken nearly 6,500 acres into trust for the benefit of the Yankton Sioux Tribe. Pet. App. 12.

B. Procedural Background

1. This litigation began when the Yankton Sioux Tribe, faced with imminent construction of a waste site on land within the original 1858 boundaries of the reservation, sought to ensure that federal environmental regulations would apply to the site. What began as a modest effort by the Tribe to respond to an unlined landfill transmogrified into litigation posing an existential threat to the Yankton Sioux Reservation.

The dispute reached this Court in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). This Court held that the Tribe's agreement to cede 168,000 acres of their unallotted lands to the United States in 1894 had "diminished" the original 1858 reservation. *See id.* at 345. The Court then concluded that, because the proposed waste site lay

on ceded unallotted land, it was not within the boundaries of the diminished reservation and therefore not subject to federal environmental regulation. *Id.* at 340, 358.

This Court expressly declined to reach the broader question whether the 1894 Act had "disestablished" the Yankton Sioux Reservation in its entirety. *Id.* at 358. The Court noted, however, that some clauses of the 1894 Act "contradict[ed]" and "counsel[ed] against finding the reservation terminated." *Id.* at 350. Specifically, the Court observed that it was "'difficult to imagine'" why Congress would have reserved agency trust lands for tribal use "'if it did not anticipate that the opened area would remain part of the reservation.'" *Id.* (quoting *Solem v. Bartlett*, 465 U.S. 463, 474 (1984)). The Court further noted that Article XVII's prohibition against the sale of liquor on ceded lands and other lands within the reservation "signal[ed] a jurisdictional distinction between reservation and ceded land." *Id.*

2. On remand, and after the case was consolidated with another one concerning the reservation's boundaries, the district court conducted an evidentiary hearing. Based on the evidence, the district court concluded that the 1894 Act diminished the reservation only to the extent of the *unallotted* lands the Tribe had ceded to the United States in 1894. *See* Pet. App. 250-320. The court reasoned that nothing in the language of the agreement supported total disestablishment of the reservation, whereas several articles strongly indicated that a diminished reservation would persist. *See id.* at 287-304.

The district court also relied on the context of the Act. Reports of the government's negotiations with the Tribe, the court observed, "memorialized only the consent of the Tribe to sell the surplus [unallotted] lands"; they did not discuss total disestablishment or further diminishment beyond the unallotted lands. *Id.* at 276. Representations by the Commissioners who negotiated the agreement further suggested that the Tribe would retain independent powers of self-government over the lands it did not cede. *See id.* at 276-281. Based on that evidence, the court concluded that the Yankton Sioux Reservation consists, in diminished form, of all land "within the original exterior 1858 Treaty boundaries" that the Tribe did not cede to the United States in the 1894 Act, as well as the agency trust land that the Act specifically reserved from sale. *Id.* at 316.

3. The Eighth Circuit affirmed in part, reversed in part, and remanded for further proceedings. *See id.* at 199-249. The court of appeals agreed that the 1894 Act did not disestablish the Yankton Sioux Reservation. *Id.* at 237-243. At a bare minimum, the Eighth Circuit noted, the agency trust lands, which this Court had specifically highlighted in *Yankton*, remain part of the reservation. *Id.* at 241. The court of appeals disagreed, however, with the Tribe's argument that the original reservation had been diminished only with respect to the ceded, unallotted lands. Rather, the court found the reservation further diminished by subsequent sales of allotted lands to non-Indians — lands that, according to the court, the 1894 Congress "foresaw

would pass into the hands of the white settlers and homesteaders." *Id.* at 243.

4. Both the State and the Tribe sought certiorari. The State maintained its total disestablishment position and the Tribe maintained the position on which it had prevailed in the district court — namely, that the reservation had not been further diminished by sales of allotted lands to non-Indians. The United States "agree[d] with the Tribe" that the reservation had not been further diminished. U.S. Br. in Opp. (Nos. 99-1490, 99-1683) at 21. The United States opposed certiorari, however, noting the absence of a clear split in authority and the interlocutory posture of the case. This Court denied review. *See South Dakota v. Yankton Sioux Tribe*, 530 U.S. 1261 (2000).

5. On remand, the district court determined that various parcels within the original 1858 boundaries maintained reservation status: (1) agency trust lands reserved to the United States in the 1894 Act, then returned to the Tribe in 1929; (2) lands allotted to individual Indians that remain in trust today; (3) lands additionally taken into trust under the 1934 IRA; and (4) lands allotted to individual Indians that are still owned in fee by Tribe members but not held in trust. *See* Pet. App. 122-163. The district court again rejected the defendants' claim that Congress had disestablished the Yankton Sioux Reservation in its entirety. *Id.* at 127-128.

6. The Eighth Circuit largely affirmed. *See id.* at 1-51. The court of appeals held that the diminished reservation included (1) agency trust

lands, (2) allotted lands that remain in trust, and (3) lands taken into trust under the 1934 IRA. *Id.* at 51. The court found further that nearly 175 acres of miscellaneous lands acquired in trust under authorities other than the IRA qualify as dependent Indian communities under the definition of "Indian country" in 18 U.S.C. § 1151(b). *Id.* at 42-43. But the court of appeals vacated the district court's holding that allotted fee lands continuously owned by Indians but not held in trust are also Indian country, reasoning that the lack of a "fully developed record" on such lands meant the issue was not ripe for review. *Id.* at 46.

The court further acknowledged the defendants' renewed efforts to declare the Yankton Sioux Reservation disestablished, but noted that they had offered "no persuasive reasons to revisit" or deem "erroneous" the prior holding, which had been based on "an exhaustive analysis of ... historical materials." *Id.* at 21, 23; *see also id.* at 54.

The State and County defendants filed petitions for rehearing and rehearing en banc. Again, defendants renewed their total disestablishment claim — which, the Eighth Circuit noted, they had already "unsuccessfully pressed ... twice before the district court ... and twice before this court," and each time had been "squarely rejected after thorough study of the record and exhaustive consideration of the precedents." *Id.* at 54, 61.

Defendants also took issue with two sentences in a footnote of the court of appeals' opinion to the effect that former allotments within the original boundaries of the reservation that were patented in

fee after 1948 would have reservation status. The Eighth Circuit issued a revised opinion with an identical judgment that eliminated the footnote, and criticized defendants for objecting to dicta on "issues which the court did not decide and which are beyond the scope of this litigation." *Id.* at 56.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Applied Well-Established Legal Principles To The Facts Of This Case.

The Eighth Circuit's determination that Congress did not express a clear intent to disestablish the Yankton Sioux Reservation in 1894 reflects a fact-bound application of established legal standards to a detailed evidentiary record. That fact-intensive determination, reflecting the considered views of both lower courts, does not warrant this Court's review. *See* Sup. Ct. R. 10; *cf. Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (this Court does not "review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error").

The governing standards for disestablishment are well-settled. This Court has adopted "a fairly clean analytical structure" for analyzing disestablishment issues. *Solem*, 465 U.S. at 470. The "first and governing principle" is that "*only Congress* can divest a reservation of its land and diminish its boundaries." *Id.* (emphasis added). "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots," that whole block retains the

status of reservation "*until Congress* explicitly indicates otherwise." *Id.* (emphasis added).

The Court, meanwhile, has emphasized time and again that Congress's intent to disestablish or even diminish a reservation must be "clear and plain," *United States v. Dion*, 476 U.S. 734, 738 (1986), and cannot "be lightly inferred." *Solem*, 465 U.S. at 470; *see also Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973); *United States v. Celestine*, 215 U.S. 278, 285 (1909). Congressional intent "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz*, 412 U.S. at 505; *see also id.* n.22 (giving examples of Congress's "clear language of express termination when that result is desired"). Absent such "substantial and compelling evidence," the "traditional solicitude for the Indian tribes" compels a conclusion that the reservation survives. *Solem*, 465 U.S. at 472.

That determination, moreover, is uniquely fact-bound. Each surplus land act that followed the General Allotment Act must be construed in light of "the circumstances underlying its passage." *Solem*, 465 U.S. at 469. Thus, even when treaties with different tribes contain comparable language, "the historical record and ... context of the treaty negotiations" may compel different outcomes. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999).

The Eighth Circuit applied those "standard rules of interpretation" to the particular facts and circumstances surrounding the surplus land act at issue here. Pet. App. 228. To gauge Congress's

intent, the court correctly looked to the "most probative evidence" — the statutory language — as well as "legislative history" and "events surrounding the statute's passage." *Id.*; *see also id.* at 30-34, 221-222, 224-243. And based on the extensive record amassed by the parties, the Eighth Circuit, like the district court, reasonably concluded that "[n]either the text of the 1894 Act nor evidence of the parties' contemporaneous understandings *clearly establish* an intent to disestablish the Yankton Sioux Reservation." *Id.* at 241 (emphasis added); *see also id.* at 32-34.

The Eighth Circuit, like the district court before it, emphasized that the text of the 1894 Act "refer[red] explicitly *only* to the ceded lands," not to any change in the status of other lands. *Id.* at 229 (emphasis added). Article V, moreover, required that funds be set aside "[f]or the care and maintenance of such orphans, and aged, infirm, or other helpless persons of the Yankton tribe," "schools and educational purposes," "courts of justice," and "other local institutions," *id.* at 341 — suggesting "an intent to preserve tribal self-government." *Id.* at 292. Article VIII required the United States to set aside from white settlement 1,000 acres for "agency, schools, and other purposes" for the support of the Tribe — reflecting Congress's expectation that the federal government would continue to play a significant role in providing "for the welfare of the Tribe." *Id.* at 240, 342-343. And Article XVII, in barring alcohol sales, specifically distinguished between "lands ... ceded and sold to the United States" and "any other lands within or comprising the reservation[]." *Id.* at 347. That distinction

would be incoherent unless Congress anticipated that "lands ... comprising the reservation[]" would continue to exist. All those articles, the Eighth Circuit and district court concluded, establish Congress's intent to preserve the reservation status of at least some allotted lands.

Both the Eighth Circuit and the district court further observed that the federal Commissioners negotiating the agreement did not view their mission as encompassing disestablishment of the reservation. *See id.* at 232, 276. The Commissioners reported to Congress that the Yankton Sioux Indians "were not selling their whole reservation," as "more than three-fifths of it would remain in their possession." *Id.* at 236. At a meeting with the Tribe, Commissioner Cole declared that "the Great White Father ... does not want you to sell your homes that he has allotted to you. He wants you to keep your homes forever." *Id.* at 216. The Commissioners even suggested that the Tribe might have their "reservation organized as a separate county." *Id.* at 233. Accordingly, the Commissioners did not "mention any transfer of the Yanktons' tribal sovereignty," and instead made numerous references to a "continuing tribal government." *Id.* at 233, 236.

As explained in the Conditional Cross-Petition, the Tribe believes that the best reading of Congress's intent is that the reservation was diminished only to the extent of the ceded lands. *See* Conditional Cross-Petition of Yankton Sioux Tribe, No. 10-1058. But the evidence detailed above confirms that the one position that is not reasonable is the one advocated by petitioners — that Congress clearly intended to disestablish the entire reservation. And in any

event, petitioners' contrary arguments amount to no more than a request for fact-bound error correction.

II. There Is No Split In Authority Warranting This Court's Intervention.

The Eighth Circuit's inherently fact-specific assessment of this specific reservation implicates no clear conflict in authority.

A. There Is No Conflict With Supreme Court Precedent.

1. Petitioners strain to conjure a "conflict" with this Court's decision in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). *See* State Pet. 23-26; County Pet. 24-27; District Pet. 13. County petitioners, for example, assert that this Court "held that the 1858 reservation boundaries were disestablished in their entirety." County Pet. 25. This Court, of course, held no such thing. The Court made crystal clear that it was not opining definitively on "whether Congress disestablished the reservation altogether." 522 U.S. at 358.

This Court's reasoning, however, strongly suggested that the reservation was *not* disestablished. The Court noted that certain provisions of the Act "contradict[]" and "counsel[] against finding the reservation terminated," including the provisions concerning agency lands and alcohol discussed above. *Id.* at 350. The Court concluded, for example, that it was "'difficult to imagine'" why Congress would have reserved agency trust lands for tribal use "'if it did not anticipate that

the opened area would remain part of the reservation.'" *Id.* (quoting *Solem*, 465 U.S. at 474).[2]

Indeed, the Court's reasoning in finding a diminishment depended in significant respects on there not being a total disestablishment. Provisions of the Act that referenced a continuing reservation could be reconciled with a diminishment finding only if a diminished reservation would continue to exist. In other words, certain provisions of the Act were distinguishable in *Yankton* on the ground that they applied to the portion of the reservation that Congress was not disestablishing in 1894; but they cannot be reconciled with petitioners' position that Congress was completely disestablishing the reservation.

Petitioners nonetheless accuse the Eighth Circuit of disregarding a supposed "presumption of diminishment/*disestablishment*." County Pet. 22 (emphasis added); *see also* State Pet. 24. But *Yankton* held only that the 1894 Act's cession of the unallotted acres for a sum certain led to a "presumption of *diminishment*" as to those unallotted acres, *not* that there was a further presumption of total disestablishment of all reservation lands. *See* 522 U.S. at 344 ("explicit

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[2] This Court certainly did not hold, as petitioners claim, that the agency trust lands are not reservation lands. Petitioners are correct that this Court held generally that the unallotted lands are not reservation, but it recognized that the agency trust lands (which had been unallotted) are different by emphasizing that Congress must have intended that they "'would remain part of the reservation.'" *Yankton*, 522 U.S. at 350.

language of cession" and "fixed-sum payment" create "'presumption of diminishment'"); *see also Hagen v. Utah*, 510 U.S. 399, 411 (1994) ("statutory expression of congressional intent to diminish" and "sum certain payment" create "presumption that the reservation had been diminished").

Nor would a broader presumption make sense in this case, where the Tribe ceded only 40% of its reservation to the United States. The 1894 agreement to sell those unallotted lands for a sum certain manifested an intent to divest *those* lands from Indian sovereignty, and thus diminish the reservation to that extent. But there is no basis for presuming that Congress intended to further diminish or totally disestablish the reservation with respect to all of the other lands — allotted lands comprising a majority of the original reservation — that the Tribe did *not* cede and for which it did *not* receive a sum certain as payment. *Cf.* Pet. App. 213 (terms "diminishment" and "disestablishment" not "interchangeabl[e]"; "disestablishment generally refers to the relatively rare elimination of a reservation while diminishment commonly refers to the reduction in size").

2. Petitioners also assert a conflict with *DeCoteau v. District County Court*, 420 U.S. 425 (1975), where the Court found the Lake Traverse Indian Reservation disestablished. *See* State Pet. 20-24; County Pet. 33-35; District Pet. 10. But their claim that *DeCoteau* controls "[a]s night follows day," State Pet. 20, is telling. That premise "that similar language in two Treaties involving different parties has precisely the same meaning" is the very assumption that this Court has dismissed as "a

fundamental misunderstanding of basic principles of treaty construction." *Mille Lacs*, 526 U.S. at 202. As the Court has consistently warned, analysis of surplus land acts must be individualized based "on the language of the act and the circumstances underlying its passage." *Solem*, 465 U.S. at 469.

This is a case in point. Any parallels between the Yankton and Lake Traverse agreements do not nullify the stark differences. In *DeCoteau*, "'the face of the Act,' and its 'surrounding circumstances' and 'legislative history,' *all point[ed] unmistakably*" to disestablishment. 420 U.S. at 444-45 (emphasis added). The tribe indicated with marked clarity that the reservation would be terminated. *See id.* at 433-34 ("'We never thought to keep this reservation for our lifetime.... We don't expect to keep reservation.'"); *id.* at 435-436 n.16 ("'This little reservation ... was given us as a permanent home, but now we have decided to sell'").

Here, by contrast, the courts' "exhaustive analysis" of the Yankton Sioux Tribe's agreement and the historical evidence uncovered no such unmistakable signs. Pet. App. 23. The negotiating Commissioners never "describe[d] any reservation boundaries or mention[ed] any transfer of the Yanktons' tribal sovereignty." *Id.* at 236. Rather, the Commissioners assured the Tribe that the government "only wants you to sell your surplus lands for which you have no use," *id.* at 222, and "wants you to keep your homes forever." *Id.* at 216. They further suggested that the Tribe's leaders would "retain some governing powers" and might "'have this reservation organized as a separate county.'" *Id.* at 233. Because the context, "content

and wording of the agreements are very different," *id.* at 221, the Eighth Circuit correctly distinguished *DeCoteau*.

3. Finally, petitioners also suggest that the Eighth Circuit's analysis conflicts with this Court's decisions by not giving adequate consideration to post-enactment history and tribal "land in common" in assessing reservation status. *See* State Pet. 22, 24-25, 29-30. As this Court explained in *Solem*, however, when post-enactment treatment is "rife with contradictions and inconsistencies," it is "of no help to either side." 465 U.S. at 478. And this Court already determined that post-1894 understandings of the Yankton Sioux Reservation have been "conflicting," "mixed," and "inconsistent" at best. *Yankton*, 522 U.S. at 354, 356, 358; *see also id.* at 354 & n.5 (noting that Congress in 1896 and even the 1980s and 1990s still referred to the "Yankton Indian Reservation"). Petitioners' one-sided portrayal of the post-enactment history is misleading, and only underscores the fact-bound nature of the question presented. *See infra* p.11-15.

Nor is the apparent lack of tribal ownership of land immediately following the 1894 Act dispositive. This Court stated in *Solem* that reservation status was generally "coextensive with tribal ownership" at the turn of the century. 465 U.S. at 468. But that reference to "tribal ownership" is not limited to land owned by a tribe qua tribe; instead, it reasonably encompasses ownership of allotted parcels by individual tribal members and tribal rights to use and occupancy of agency trust lands, both of which have always been present here. *See* Pet. App. 230. And in any event, tribal retention of land in common

is at most one factor in the broader analysis of congressional intent. *See Yankton*, 522 U.S. at 358 ("The conflicting understandings about the status of the reservation, *together with* the fact that the Tribe continues to own land in common, caution us ... to limit our holding") (emphasis added).

B. There Is No Conflict Within The Eighth Circuit.

Petitioners next assert that the Eighth Circuit's decisions are "internally contradictory." State Pet. 31. Even if that were true, which it is not, certiorari would not be warranted because "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957). In any event, there are no "internal difficulties" because the Eighth Circuit's decisions are fully consistent.

In *Gaffey*, the Eighth Circuit held that "lands originally allotted to tribal members which have passed out of Indian hands ... are not part of the Yankton Sioux Reservation." Pet. App. 247. The court then held that other lands *did* remain part of the reservation, though the court was not prepared to "define the[ir] precise limits" on the scant record at that time. *Id.* at 248-249. It therefore "remand[ed] to the district court with instructions to develop the record ... relevant to the status of the remaining categories of land." *Id.* at 17. The Eighth Circuit's subsequent decisions in this case and the companion *Army Corps* case are fully consistent with *Gaffey* for the simple reason that they address issues that *Gaffey* left open for remand.

Petitioners appear to assume that, because private land sales cannot by themselves diminish a reservation, total disestablishment is the only possible explanation for *Gaffey*'s holding that lands sold to non-Indians are no longer reservation. That is clearly wrong because *Gaffey* expressly rejected disestablishment before holding, in the same opinion, that allotted lands sold to non-Indians are no longer reservation. *Id.* at 247.

The Tribe, to be sure, disagrees with the Eighth Circuit's holding to that extent and believes that Congress did not intend any further diminishment. But that context-specific, fact-bound dispute does not warrant further review. It certainly does not warrant further review of petitioners' extreme total disestablishment position.

C. There Is No Clear Conflict With The South Dakota Supreme Court.

Finally, the Eighth Circuit's fact-intensive decisions present no clear and intractable split with decisions of the South Dakota Supreme Court, as the Eighth Circuit itself concluded. *Id.* at 23 n.7.

In *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), a tribal member defendant convicted on a state burglary charge argued on habeas that the state lacked jurisdiction because the offense took place in "Indian country." *Id.* at 365. The South Dakota Supreme Court held that the relevant parcel was not "Indian country" and denied relief. *Id.* at 378. The parties had stipulated that the offense took place on allotted lands which had passed into non-Indian ownership, and the court reasoned that such lands do not have reservation status. *See id.* at 365

("Here we must decide the status of allotted lands which have passed into non-Indian ownership.").

The Eighth Circuit has fully agreed with the South Dakota Supreme Court on that point: "lands originally allotted to tribal members which have passed out of Indian hands ... are not part of the Yankton Sioux Reservation and are no longer Indian country." Pet. App. 247. Although the South Dakota Supreme Court's opinion reached out to include the broader rationale that the 1894 Act disestablished the Yankton Sioux Reservation in its entirety, that rationale was unnecessary to the decision of the case, and thus, as the Eighth Circuit observed, it does not present a square conflict. *Id.* at 23 n.7. This Court reviews conflicts in holdings, not in unnecessary reasoning.

Moreover, the Eighth Circuit and the South Dakota Supreme Court apparently agree that the lands at issue in this case — various lands held in trust for the tribal members — are "Indian country." *Bruguier* repeatedly noted, in reasoning that the parcel at issue in that case was not "Indian country," that it was not "trust land." 599 N.W. at 378; *see also id.* at 367 ("none of [Pickstown] is now held ... in trust"); *id.* at 369 ("Congress must not have considered Pickstown Indian country taken in trust for the Yankton Tribe or its members"). Accordingly, that court appeared to recognize that trust lands are Indian country. And as explained below, jurisdictional status generally turns on that classification, not on whether land is also within a reservation.

In this and every other reported case, therefore, any difference in reasoning between the two courts has no practical effect. Petitioners' inability to cite any state or federal case over the past decade that was affected by the supposed conflict confirms that there is no meaningful, square conflict. And, in all events, there is no more reason to review this issue now than when this Court last denied certiorari. The split has not deepened and this case remains interlocutory even at this stage. *See* Pet. App. 45 (deeming status of former allotments continuously held in fee by Indians to be not yet "ripe for resolution").

III. The Decision Below Lacks Exceptional Importance.

While the Eighth Circuit's decision has profound cultural significance to the Yankton Sioux Tribe, it is not exceptionally important from a practical or legal standpoint.

1. At the outset, the territorial scope of the parties' dispute has narrowed dramatically over the course of this litigation, including in the 11 years since this Court denied review of the question presented. In the decision below, the Eighth Circuit upheld the reservation status of a mere 37,000 acres — approximately 8.5% of what was once a 430,405-acre reservation set aside as a homeland for the Tribe under the 1858 Treaty. The diminished reservation is located entirely within Charles Mix County, whose population today totals approximately 9,000 — over 30% (2,900) of which are Indian. *See* 2010 Census Data, www.census.gov. Thus, from historical, territorial, and demographic

perspectives, the Eighth Circuit's holding that this 37,000-acre fraction remains part of the Yankton Sioux Reservation raises issues of only limited importance.

2. More importantly, even within those acres, the nature of the jurisdictional dispute between petitioners and the Tribe is narrow. As noted above, the Eighth Circuit, the Supreme Court of South Dakota, and the parties all agree that the allotted lands continuously held in trust for the Tribe and its members are "Indian country" under 18 U.S.C. § 1151. *E.g.*, Pet. App. 226. Petitioners view the lands as being Indian country within the meaning of § 1151(c), which covers "all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." The Tribe views the lands as being Indian country under both § 1151(c) and § 1151(a), which covers "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation."[3]

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[3] The court of appeals separately addressed the status of different categories of lands and in some instances gave additional, contextual reasons for holding each to be Indian country. For example, the court of appeals concluded that lands taken into trust under the IRA are Indian country whether or not they are also reservation, *see* Pet. App. 37, and that certain other lands are "dependent Indian communities" comprising Indian country under 18 U.S.C. § 1151(b). Pet. App. 159-60. The court thereby made clear that all of these lands are Indian country whether or not they are reservation.

For the Tribe, the distinction between "reservation" land and land that is "Indian country" but not "reservation" land is vital to preserving the Tribe's cultural heritage. As the Eighth Circuit recognized, "[w]hatever the size of the remaining reservation lands," the record reflects that those lands hold "continuing relevance and importance to the Yankton Sioux Tribe as a touchstone linking tribal members with each other and with their common culture, history, and heritage." Pet. App. 14. The Indian character of these lands has persisted since 1894, and the "population of Indians living on and adjacent to the Yankton Sioux Reservation" has actually "increased during the 1990's," continuing to rise today. *Id.* at 315.

The Indian population has fueled demands for housing, elementary school education, and other services. *See* U.S. Br., *Gaffey*, at 41 (quoting Tr. of May 20, 1998 Evidentiary Hearing at 22, 72, 73, 76). Further, the Tribe is the largest employer in the county, assembling a workforce that is 75% Indian. *Id.* at 42 (quoting Tr. 69). Thus, the successful efforts of the Tribe to maintain a homeland for its

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Those holdings are not within the scope of the question presented, which asks only whether Congress completely disestablished the reservation in 1894. *See, e.g.*, State Pet. i. Petitioners had good reason not to include those rulings concerning specific categories of lands in the question presented, because they are even less important and less deserving of this Court's review than petitioners' total disestablishment position. Thus, the practical importance of the question presented is limited to the difference between reservation and other types of Indian country — a distinction that, as explained in the text, lacks exceptional importance.

members, to preserve its cultural heritage, and to protect its integrity and self-determination would be thoroughly undermined by a finding that the Yankton Sioux Reservation ceased to exist in 1894.

Apart from the cultural significance to the Tribe of having a reservation, however, the distinction between sub-provisions of Section 1151 lacks practical significance in this case. Petitioners fail to articulate any significant jurisdictional distinction between lands within an Indian reservation and other Indian country. Jurisdictional consequences generally flow from whether land is "Indian country," not from whether it is "reservation" or is Indian country for some other reason. *See, e.g.*, *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 n.2 (1995); *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991); *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 528-30 (1998).

The practical difference between Indian country under § 1151(a) and § 1151(c) is that Indian country under the former remains part of the reservation even when sold to non-Indians, whereas Indian country under the latter loses its Indian country status upon any sale to a non-Indian going forward. At this point in time, however, it is nearly inconceivable that the Tribe would sell the remaining acres at issue to non-Indians, especially considering that the government holds them in trust for the benefit of the Indians.

Thus, there is no real consequence to whether the lands are Indian country for the one reason as

opposed to another. So long as the trust lands are classified as Indian country for any reason, the Tribe and the federal government have primary jurisdiction. *See Citizen Band*, 498 U.S. at 511; *United States v. McGowan*, 302 U.S. 535 (1938); *United States v. Pelican*, 232 U.S. 442 (1914). But under any classification, an Indian tribe's authority over non-Indians is sharply limited under this Court's precedents.

A tribe's inherent sovereign powers "do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565 (1981); *see also id.* at 564 ("exercise of tribal power [does not go] beyond what is necessary to protect tribal self-government or to control internal relations"). The "general rule" is that "Indian tribes lack civil authority over the conduct of nonmembers," even on "non-Indian land within a reservation." *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997); *see also Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 650 (2001) ("Indian tribe power over nonmembers on non-Indian fee land is sharply circumscribed.").

The *only* civil authority tribes may exercise over non-members on non-Indian fee lands within a reservation is limited to two narrow exceptions: (1) activities of non-members who enter consensual commercial dealing, contract, or lease relationships with the tribe or its members, and (2) conduct of non-members that menaces the tribe's "political integrity," "economic security," or "health or welfare." *Montana*, 450 U.S. at 565-66; *see also* Cohen's Handbook of Federal Indian Law § 4.02[3][c], at 233 (2005 ed.) (noting "elevated threshold for satisfying the two *Montana*

exceptions"). And this Court has construed those exceptions narrowly. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008); *Atkinson*, 532 U.S. at 656.

Amici's claim that the Eighth Circuit has given the Tribe "criminal jurisdiction over the affected lands — period" is similarly foreclosed by settled law. *Amicus* Br. for Colin Soukup et al., at 17. This Court long ago established, in a case involving non-Indian residents *on a reservation*, that "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978), *superseded in part by statute on other grounds as stated in United States v. Lara*, 541 U.S. 193, 205-07 (2004); Cohen's Handbook § 4.02[3][b], at 226.

3. The lack of exceptional practical importance is confirmed by the strained efforts of petitioners and *amici* to pose academic questions that are not actually presented by the decision below. They attack a statement in a footnote in the court of appeals' original opinion stating that allotted lands that were first transferred to non-Indians after 1948 remain reservation lands. County Pet. 19-20 & n.4; *see also* State Pet. 34-35, 37; Dist. Pet. 6-9; *Amicus* Br. for Colin Soukup et al., at 9-25; *Amicus* Br. for Wagner Cmty. Sch. Dist., at 4-5. Indeed, many of the briefs, including the District's petition and most of the *amici* briefs, appear to rely entirely on such allotted lands for their assertions of harm. But as petitioners begrudgingly acknowledge, the Eighth Circuit removed that footnote from its final amended opinion.

In deleting the footnote, the Eighth Circuit criticized petitioners for spinning out "possible consequences of a decision which the court has not reached" and raising a "virtual smokescreen" and "straw man to attack." Pet. App. 54, 56, 59-60. The two sentences were mere "dicta" that "did not speak to any matter actually litigated or decided." *Id.* at 54-55.

Petitioners and *amici* now attack the same straw man even though the straw man is now a phantom lacking even the weight of straw in light of the Eighth Circuit's deletion of the footnote. Notwithstanding vague allusions to a residual "rationale" in the amended opinion, *see* County Pet. 20 n.4, District Pet. 9, petitioners have not identified any holding about the lands in question that this Court could review, because there is none. Indeed, the very multitude of estimated acreages of post-1948 lands bandied about — "5,900" (State Pet. 35), "6,000" (County Pet. 19), "7,000" (District Pet. 6), and "8,000" (*Amicus* Br. of Wagner Cmty. Sch. Dist., at 4) — confirms that no court has yet to consider the post-1948 fee lands. As the court determined, the "record remains inadequate to decide the status of such lands." Pet. App. 60.

Accordingly, that issue is not ripe for this Court's review. *Cf., e.g., Amicus* Br. of Wagner Cmty. Sch. Dist., at 5 (language "will undoubtedly be used in future litigation to argue that post 1948 fee lands are within the limits of an 18 U.S.C. § 1151(a) reservation"). If and when the issue is litigated, a court delivers a binding judgment, and actual consequences materialize, the issue will be ripe for this Court to decide whether to review it. In the

interim, petitioners' focus on this phantom only underscores that the actual decision below has insufficient importance to warrant review. This Court "reviews judgments, not statements in opinions." *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956). *A fortiori*, it does not review statements that have been deleted from opinions.

4. The Eighth Circuit's decisions below also have little impact on other Indian reservations nationwide. Petitioners claim that the decision creates "the prospect of thousands or perhaps tens of thousands of such permanent 'mini-reservations' nationally" because many "terminated areas of reservations contain allotted land." State Pet. 36. But such assertions not only adopt the fallacy that all surplus land acts are the same, they also forget that the Eighth Circuit engaged in a careful, category-by-category analysis of the reservation status of each type of trust lands precisely to avoid a broad-brush rationale that would extend beyond this particular reservation. *See* Pet. App. 34-44.

And the "checkerboard" shape of the Yankton Sioux Reservation is by no means unprecedented. From the Red Lake Indian Reservation and Bois Forte Indian Reservation in Minnesota, to the Paiute Indian Reservation in Utah, to the Laguna Pueblo, Zia Pueblo, and Jemez Pueblo Reservations in New Mexico, numerous Indian reservations across the United States have long consisted of scattered, non-contiguous parcels. *See, e.g., Montana*, 450 U.S. at 559 (plurality opinion); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 421 (1989); *Ute Indian Tribe of Uintah & Ouray*

Reservation v. Utah, 114 F.3d 1513, 1530 (10th Cir. 1997).

That should come as no surprise, because the allotment policy had the inevitable effect of producing non-contiguous reservations, as non-Indians purchased some parcels while Indians retained others. Thus, this Court has rejected the contention that "it is not to be supposed that Congress has intended to maintain the Federal jurisdiction over hundreds of allotments scattered through territory other portions of which were open to white settlement." *Pelican*, 232 U.S. at 449-50. "Nor does the territorial jurisdiction of the United States depend upon the size of the particular areas which are held for Federal purposes." *Id.* at 450.

Jurisdiction in the Yankton Sioux Reservation, as in other non-contiguous reservations, has proven workable. In the 12 years since *Gaffey*, federal, state, and tribal authorities have all cooperated effectively and harmoniously. For many years, the Yankton Sioux Tribe has entered cooperative agreements with the County and State on public matters ranging from road maintenance and fire protection, to use of the same jail, to emergency dispatch services — agreements that, by their terms, expressly set aside jurisdictional disagreements for the safety and benefit of residents. Tribal and federal law enforcement officials, meanwhile, have been exercising jurisdiction over crimes committed on tribal trust lands and individual trust properties without incident — as confirmed by the absence of an actual conflict in authority between the federal and state courts.

Over a decade ago, when *Gaffey* was newly decided, the Tribe sought certiorari because it appeared that the Eighth Circuit's decision would have exceptionally important practical consequences. The past decade of on-the-ground experience has shown those concerns to be misplaced. And now that tribal, federal, and local authorities have adapted to this regime, changing it would be among the most destabilizing options of all.

CONCLUSION

This Court should deny the petitions for a writ of certiorari.

Respectfully submitted,

Paul D. Clement
Counsel of Record
BANCROFT PLLC
1919 M St. NW, Suite 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

Daryl L. Joseffer
Candice Chiu
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 737-0500

Richard A. Guest
NATIVE AMERICAN
RIGHTS FUND
1514 P Street NW,
Suite D
Washington, DC 20005
(202) 785-4166

Charles Abourezk
ABOUREZK &
ZEPHIER, P.C.
P.O. Box 9460
2020 W. Omaha Street
Rapid City, SD 57709
(605) 342-0097

Counsel for Respondent
Yankton Sioux Tribe

May 9, 2011

Nos. 10-929, 10-931, 10-932 and 10-1058

In the Supreme Court of the United States

DENNIS DAUGAARD, GOVERNOR OF SOUTH DAKOTA, ET AL., PETITIONERS

v.

YANKTON SIOUX TRIBE, ET AL.

SOUTHERN MISSOURI RECYCLING AND WASTE MANAGEMENT DISTRICT, PETITIONER

v.

YANKTON SIOUX TRIBE ET AL.

PAM HEIN, STATE'S ATTORNEY OF CHARLES MIX COUNTY, ET AL., PETITIONERS

v.

YANKTON SIOUX TRIBE ET AL.

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DENNIS DAUGAARD, GOVERNOR OF SOUTH DAKOTA, ET AL.

ON PETITIONS AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

(Additional Counsel Listed on Inside Cover)

IGNACIA S. MORENO
Assistant Attorney General
KATHRYN E. KOVACS
KATHERINE W. HAZARD
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, did not wholly disestablish the Yankton Sioux Reservation.

2. Whether the Yankton Sioux Reservation includes all lands within its original boundaries other than those the Tribe ceded to the United States for sale to non-Indians in the 1894 Act.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1-51a)[1] is reported at 606 F.3d 994. The memorandum opinion and order of the district court (Pet. App. 122-163) is reported at 529 F. Supp. 2d 1040. A prior opinion of the court of appeals (Pet. App. 199-249) is reported at 188 F.3d 1010. A prior memorandum opinion and order of the district court (Pet. App. 250-320) is reported at 14 F. Supp. 2d 1135.

JURISDICTION

The original judgment of the court of appeals was entered on August 25, 2009. The court of appeals denied rehearing en banc and issued an amended opinion on May 6, 2010. Subsequent petitions for rehearing were denied on September 20, 2010 (Pet. App. 321-322). On December 14, 2010, Justice Alito extended the time within which to file petitions for writs of certiorari to and including January 18, 2011 (Pet. App. 323), and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The conditional cross-petition was filed on February 22, 2011.

STATEMENT

1. Section 1151 of Title 18 classifies three categories of land as "Indian country": "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation"; "(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired

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[1] Citations in this brief to the petition appendix refer to the petition appendix in No. 10-929.

territory thereof, and whether within or without the limits of a state"; and "(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." For land in any of these three categories, criminal jurisdiction in cases involving tribal members generally rests primarily with the United States and the particular Indian tribe, rather than the State in which the Indian country lies. See 18 U.S.C. 1151-1153. The same distinction "generally applies * * * to questions of civil jurisdiction" as well. *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 n.2 (1975); see *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998).

2. The Treaty of April 19, 1858, 11 Stat. 743 (Pet. App. 324-336), established a 430,000-acre Reservation for the Yankton Sioux Tribe (Tribe) in what is now Charles Mix County in southeastern South Dakota. Pet. App. 5-6. Roughly 30 years later, Congress authorized the Executive Branch to divide portions of Indian reservations into allotments: individual parcels of land that would be held in trust by the United States for the benefit of individual tribal members to whom the parcels could eventually be conveyed in fee. See Indian General Allotment Act (Dawes Act), ch. 119, 24 Stat. 388 (1887); Act of Feb. 28, 1891, ch. 383, 26 Stat. 794. More than 262,000 non-contiguous acres of the Yankton Sioux Reservation were allotted. Pet. App. 8.

In 1892, Congress directed the Secretary of the Interior to negotiate with the Tribe for the sale of surplus reservation lands that were not needed for allotments. Act of July 13, 1892, ch. 164, 27 Stat. 137. In December 1892, tribal leaders signed an agreement (the 1892 Agreement), later adopted by a majority of the Tribe, in which the Tribe agreed to "cede, sell, relinquish, and

convey" its interest in all the unalloted lands—approximately 168,000 acres interspersed among the allotments—within the Reservation for $600,000. Pet. App. 8, 339. Although the Agreement specified that most of the ceded land would be sold to non-Indian settlers, a portion was exempted from such sale and set aside for continued use by the United States for Indian agency, schools, and other tribal-support purposes for as long as necessary. *Id.* at 342-343. In 1894, Congress "accepted, ratified, and confirmed" the 1892 Agreement. Act of Aug. 15, 1894, ch. 290, § 12, 28 Stat. 319 (1894 Act).

3. In *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329 (1998), this Court held that the 1894 Act diminished the Reservation by severing the unallotted ceded lands from the Reservation. In reaching that result, the Court principally relied upon the "'cession' and 'sum certain'" language in the 1894 Act, by which the Tribe ceded and conveyed all of its interest in the unallotted lands for a sum certain. *Id.* at 344. The Court had previously held that such language creates an "almost insurmountable" presumption of diminishment. *Ibid.*; *Hagen* v. *Utah*, 510 U.S. 399, 411 (1994); *Solem* v. *Bartlett*, 465 U.S. 463, 470 (1984).

The land at issue in *Yankton Sioux Tribe* was unallotted land ceded to the United States by the 1894 Act for sale to settlers. The Court therefore found it unnecessary to decide whether the Reservation had been wholly disestablished. 522 U.S. at 358.

4. On remand, the district court consolidated the original action, *Yankton Sioux Tribe* v. *Southern Missouri Waste Management District* (No. 94-4217), with a new action, *Yankton Sioux Tribe* v. *Gaffey* (No. 98-4042). In the new action, the Tribe sought declaratory and injunctive relief precluding the State of South

Dakota and Charles Mix County from exercising criminal jurisdiction over tribal members on (1) any lands that had been allotted to members of the Tribe, whether or not those lands are now held in trust by the United States for the Tribe or individual members, and (2) the lands that had been reserved from sale to non-Indians under the 1894 Act for Indian agency, school, and other purposes, which are at present held in trust by the United States for the Tribe. The United States, which had previously participated in the original action as an amicus curiae, intervened in the consolidated action. Pet. App. 202-203.

The district court, after taking additional evidence, held that Congress had not disestablished the Yankton Sioux Reservation. Pet. App. 253. The court concluded that the 1894 Act had "modified or reconceptualized" the Reservation to consist of all of the lands within the original 1858 exterior boundaries that had not been ceded to the United States for sale to non-Indian settlers; accordingly, the Reservation continued to consist of "all of the reservation lands that were allotted pursuant to the allotment acts, as well as the lands reserved from sale for agency, school, and other tribal purposes." *Ibid.* The court based that conclusion on the text of the 1894 Act and the 1892 Agreement, the record of negotiations between the United States Commissioners and the Tribe, the materials submitted to Congress in connection with passage of the 1894 Act, and the subsequent treatment of the allotted lands by the United States, the State, and the Tribe. *Id.* at 250-321.

5. The court of appeals affirmed in part and reversed in part. Pet. App. 199-249. It agreed with the district court that the Reservation had not been disestablished. *Id.* at 203. But the court held that the Reservation had

been further diminished to exclude not only the unalloted ceded lands that were the subject of this Court's decision in *Yankton Sioux Tribe*, but also additional lands that had passed into non-Indian hands. *Id.* at 247.

a. At the outset, the court of appeals recited the well-settled principles governing the analysis of reservation diminishment and disestablishment questions. First, the court noted that "[c]ongressional intent is the touchstone" for determining whether a reservation has been diminished or disestablished, and thus that land set aside for a reservation retains that status until Congress indicates otherwise. Pet. App. 224 (citing *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586 (1977), and *Solem*, 465 U.S. at 470). Second, the court noted that Congress's "[i]ntent to diminish or disestablish a reservation must be 'clear and plain,'" and "expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Id.* at 225 (quoting *United States* v. *Dion*, 476 U.S. 734, 738 (1986), and *Mattz* v. *Arnett*, 412 U.S. 481, 505 (1973)). Third, the court noted that "neither diminishment nor disestablishment will be found lightly," and that any ambiguities in statutes or agreements bearing on the question are resolved in favor of the Tribe. *Id.* at 229 (citing *Yankton Sioux Tribe*, 522 U.S. at 344; *Hagen*, 510 U.S. at 411). Finally, the court noted that each statute that is claimed to have disestablished or diminished a reservation "must be analyzed individually, its effect depending on the language used and the circumstances of its passage." *Id.* at 228 (citing *Solem*, 465 U.S. at 469).

b. The court of appeals held that no sufficiently clear expression of Congress's intent to disestablish the Yankton Sioux Reservation could be found in the text of

the 1894 Act and the incorporated 1892 Agreement, in the record of the negotiations between the United States and the Yankton Sioux, or in the other materials before Congress at the time of the adoption of the 1894 Act. Pet. App. 229-243.

The court of appeals observed that Articles I and II of the 1894 Act—the provisions principally relied on by this Court in *Yankton Sioux Tribe*—"refer[] explicitly only to the ceded lands." Pet. App. 229. The court determined that three other articles of the 1894 Act contemplated some degree of continuing tribal governance over the allotted lands. The court concluded that Article V, which provided for an optional fund that could be used, among other things, for schools, courts, and "other local institutions for the benefit of said tribe," "clearly foresaw continued tribal activity in providing for the needs of the Yankton Sioux." *Id.* at 238-239; see *id.* at 340-341. The court viewed Article XVII, which prohibited the sale of liquor "upon any of the lands by this agreement ceded and sold to the United States" and "upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians," as "acknowledg[ing] the continued existence of two distinct categories of land to which different laws might apply." *Id.* at 239-240; see *id.* at 239 (Article XVII "signal[ed] a jurisdictional distinction between reservation and ceded land") (quoting *Yankton Sioux Tribe*, 522 U.S. at 350) (brackets in original). And the court read Article VIII, which reserved from sale to settlers those ceded lands "as may now be occupied by the United States for agency, schools, and other purposes," as indicating that "some lands were expected to remain outside of primary state jurisdiction." *Id.* at 240.

The court of appeals likewise found no clear indication of an intent to disestablish the Reservation in the record of the negotiations between the United States and the Tribe. Pet. App. 231-237. The court observed that the United States Commissioners who negotiated the 1892 Agreement had "repeatedly emphasized" to the Tribe that "their primary objective was the purchase of the *unallotted* lands." *Id.* at 232. The court noted that the Commissioners had also "indicated that the tribal leadership would retain some governing powers," and it viewed such indications as "suggest[ing] the parties did not intend to disestablish the reservation." *Id.* at 233. The court further observed that the Commissioners' subsequent report to Congress did not equate the Tribe's sale of the surplus lands with the Tribe's immediate loss of sovereignty over the unceded lands. *Id.* at 235-237. The report instead reflected what the court described as the parties' understanding that "only a portion of the reservation was being separated at that time." *Id.* at 236.

The court of appeals additionally concluded that "treatment of the Yankton area in the years following passage of the [1894] Act provides further evidence that the nonceded lands retained their reservation status until they passed out of trust." Pet. App. 243-244. Among other things, the court of appeals discussed evidence in the record regarding the Tribe's maintenance of a tribal police force and an independent judicial system, and Congress's "definitive and considered step" when, in 1929, it decided to return the lands previously reserved for tribal-support purposes to the Tribe and prohibited the allotment of those lands. *Id.* at 244-246 & n.12.

c. The court of appeals concluded, however, that the 1894 Act intended to diminish the Reservation not only by removing the ceded land, but also other (allotted) land that subsequently passed into the hands of non-Indians. Pet. App. 243, 247. The court stated that the 1894 Act, when "read in its full historical context," contemplated that tribal members would eventually obtain fee title to their allotted lands and gain the ability to sell those lands to non-Indians, and the lands would thus become subject to the civil and criminal laws of the State. *Id.* at 243. The court of appeals did not determine precisely which lands—other than roughly 1000 acres originally reserved in the 1894 Act for tribal-support purposes, which Congress, in 1929, specified should be returned to the Tribe, see Act of Feb. 13, 1929, ch. 183, 45 Stat. 1167 (1929 Act)—remained within the surviving Reservation, instead remanding to the district court to make that determination in the first instance. Pet. App. 248-249.

6. The State, the County, and the waste management district (collectively, "petitioners"), and also the Tribe, filed petitions for writs of certiorari. They presented the same issues for review that they present here: petitioners contended, contrary to the court of appeals, that the Reservation had been disestablished; the Tribe contended, contrary to the court of appeals, that the present-day Reservation includes allotted lands that have passed out of Indian ownership. See 99-1490 Pet. 11-29; 99-1683 Pet. 4-22. The United States urged the Court to deny both petitions, U.S. Br. in Opp., Nos. 99-1490 and 99-1683, and the Court denied certiorari. See *South Dakota* v. *Yankton Sioux Tribe*, 530 U.S. 1261 (2000); *Yankton Sioux Tribe* v. *Gaffey*, 530 U.S. 1261 (2000).

7. On remand, the district court held that the following lands remained within the Reservation, and were therefore Indian country under 18 U.S.C. 1151(a): (1) land allotted to members of the Tribe in 1894 and held continuously in trust by the United States for the benefit of the Tribe or its members since that time (30,051.66 acres); (2) land taken into trust by the United States for the benefit of the Tribe under the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984 (1934) (6444.47 acres); (3) land reserved to the United States in 1894 and returned to the Tribe pursuant to the 1929 Act (913.83 acres); and (4) Indian-owned fee land that has been continuously in Indian hands since 1894. Pet. App. 162; see *id.* at 82.

The district court held in the alternative that, for two independent reasons, lands in categories 1 and 2 above would be Indian country for jurisdictional purposes even if they were *not* part of a formally designated reservation. First, the court determined that those lands, if not part of a formal reservation, constituted an "informal" or "de facto" reservation, and thus would still be Indian country under Section 1151(a). Pet. App. 153-157. The court observed that under this Court's decisions, "the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation,'" but instead on "whether the area has been validly set apart for the use of the Indians as such, under the superintendence of the Government." *Id.* at 153 (quoting *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (some quotation marks omitted). The court concluded, based on the evidence of federal superintendence, that the lands met this definition. *Id.* at 156.

Second, the court determined that these lands also constituted a "dependent Indian community" under Section 1151(b). *Id.* at 159-160. "The Supreme Court," it explained, "established two requirements for off-reservation land to qualify as a dependent Indian community under § 1151(b): 'a federal set-aside and a federal superintendence requirement.'" *Id.* at 160 (quoting *Native Vill. of Venetie Tribal Gov't*, 522 U.S. at 530) (emphasis omitted). The court held, based on the evidence, that the lands satisfied these requirements. *Ibid.*

8. a. The court of appeals affirmed in part and vacated in part. Pet. App. 71-121. It reaffirmed its previous determination that the land reserved for tribal-support purposes in 1894 and returned to the Tribe under the 1929 Act was reservation land. *Id.* at 90-94. It also affirmed the district court's conclusion that two other categories of trust land—allotted land held continuously in trust by the United States and land taken into trust under the IRA—were part of the reservation as well. *Id.* at 97-112.[2] The court of appeals expressly recognized that these latter two categories of land would be considered Indian country even if the reservation had been disestablished. It observed that all parties conceded that the allotted trust lands would be Indian country under Section 1151(c), which specifically addresses allotments. *Id.* at 97-98. And it further observed that the IRA trust land would be Indian country pursuant to 25 U.S.C. 465. Pet. App. 105-107; see *id.* at 106 ("[S]ec-

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[2] The court of appeals noted that the district court had identified, but had not expressly addressed the status of, an additional 174.57 acres of trust land that had been taken into trust under statutes other than the IRA. Pet. App. 82-83, 112. The court of appeals concluded that these lands were "dependent Indian communities" and thus Indian country under Section 1151(b). *Id.* at 112-114.

tion 465 provides the proper avenue for a tribe to reestablish sovereign authority over territory.") (quoting *City of Sherill* v. *Oneida Indian Nation*, 544 U.S. 197, 221 (2005)) (brackets omitted)).

The court of appeals vacated, however, the district court's conclusion that continuously-Indian-owned fee lands are part of the Reservation. Pet. App. 114-116. It deemed the issue unripe because the record was undeveloped; among other things, it was not clear that any such lands existed. *Id.* at 115-116.

b. The panel granted in part petitioners' request for panel rehearing. Pet. App. 52-70. Petitioners' request "focus[ed] on dicta in a single footnote of [the court's] 37 page decision." *Id.* at 54. Petitioners argued that the footnote indicated that a certain set of lands—lands allotted to Indians in 1894 but sold to non-Indians after the enactment of Section 1151 in 1948—were part of the Reservation, and they (along with amici) claimed that various detrimental consequences flowed from that result. *Id.* at 58-59. The court explained that petitioners had "raised a straw man to attack" and were "well aware that the wording to which they object is not part of the judgment in this case." *Id.* at 59-60. The court nevertheless amended and reissued the opinion, removing language that might be "misunderstood" as reaching the issue of allotted lands transferred to non-Indians after 1948, but otherwise leaving the decision unaltered. *Id.* at 56; see *id.* at 1-51 (amended opinion).

ARGUMENT

The court of appeals correctly concluded that the Yankton Sioux Reservation has not been wholly disestablished and that the Reservation includes approximately 37,410 acres held in trust by the United States.

That fact-bound decision does not conflict with any decision of this Court or any other court of appeals. Nor does it have any significant practical consequence, given the jurisdictional treatment of the specific trust lands at issue in this case. For reasons largely explained by the lower courts, the trust lands are Indian country, and therefore presently subject primarily to federal and tribal jurisdiction rather than state jurisdiction, whether or not the Yankton Sioux Reservation was disestablished by the 1894 Act. Further review of the question presented by petitioners (regarding whether the Reservation was disestablished), as well as the question presented in the conditional cross-petition (regarding the extent of the Reservation), is accordingly unwarranted.

1. In concluding that the Reservation was not wholly disestablished in 1894, the court of appeals applied the standards repeatedly articulated by this Court, see, *e.g.*, *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343-344 (1998), to the particular facts and circumstances of this case. Such a fact-specific application of settled legal standards does not merit this Court's review. See Sup. Ct. R. 10.

As the court of appeals recognized (Pet. App. 225), Congress's intent to diminish or disestablish a reservation must be "clear and plain," under a standard that considers the text of the relevant surplus land Act, the legislative history, and the surrounding circumstances. *Yankton Sioux Tribe*, 522 U.S. at 343-344 (quoting *United States* v. *Dion*, 476 U.S. 734, 738-739 (1986)); *Hagen* v. *Utah*, 510 U.S. 399, 411-412 (1994); *Solem* v. *Bartlett*, 465 U.S. 469, 470-471 (1984). "This Court does not lightly conclude that an Indian reservation has been terminated," and it resolves ambiguities in favor of the

tribe. *DeCoteau* v. *District County Court*, 420 U.S. 425, 444 (1975).

There was no expression of congressional intent, much less the "clear and plain" expression required by this Court, to disestablish the Yankton Sioux Reservation. The primary purpose of the 1894 Act was to transfer unallotted surplus lands from the Yankton Sioux Tribe to the United States. That transfer was accomplished by Articles I and II of the 1894 Act—the provisions that this Court principally relied upon in *Yankton Sioux Tribe*—which provided for the cession and conveyance of the surplus lands and established the amount of payment for those lands. See 522 U.S. at 344-345. Those articles refer only to the unallotted surplus lands, not to the lands that were to be allotted to tribal members. Pet. App. 339.[3]

No other provision of the 1894 Act offers any clear indication that Congress intended that the cession of the unallotted (or "surplus") lands would result in the disestablishment of the entire Reservation. Indeed, several

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[3] The County errs in asserting (County Pet. 24-25) that the "cession and sum certain" language contained in these articles gives rise to a "disestablishment presumption." As the decisions in both *Yankton Sioux Tribe* and *Solem* explain, such language creates only a "presumption of *diminishment*" (*i.e.*, that the reservation was reduced by the area sold), not a presumption of *disestablishment* (*i.e.*, that the reservation was eliminated entirely). *Yankton Sioux Tribe*, 522 U.S. at 344 (emphasis added); see *Solem*, 465 U.S. at 470-471. This Court has already applied the diminishment presumption in *Yankton Sioux Tribe* to find that the Reservation was diminished to the extent lands were ceded to the United States for sale to non-Indians. See 522 U.S. at 351. The question now is one of complete disestablishment, and, as explained in the text, the presumption favors the continuation of the reservation, unless congressional intent to the contrary is clearly shown.

provisions of the 1894 Act and the incorporated 1892 Agreement point to the opposite conclusion.

Article VIII of the 1894 Act reserved from sale to non-Indian settlers those lands ceded by the Tribe to the United States "as may now be occupied by the United States for agency, schools, and other purposes." 28 Stat. 316 (Pet. App. 342-343). This Court recognized in *Yankton Sioux Tribe* that Article VIII "counsels against finding the reservation terminated," because Congress probably would not have reserved lands for such purposes if it had not anticipated a continuing Reservation. 522 U.S. at 350; accord *Solem*, 465 U.S. at 474. The court of appeals similarly viewed Article VIII as reflecting "Congress' expectation that the federal government would continue to have a significant presence in the area for the welfare of the Tribe," so that "some lands were expected to remain outside of primary state jurisdiction." Pet. App. 240.

Article XVII of the 1894 Act prohibited the sale or offering of intoxicating liquors "upon any of the lands by this agreement ceded and sold to the United States" *and* "upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the [1858] treaty." 28 Stat. 318 (Pet. App. 347). As this Court observed in *Yankton Sioux Tribe*, Article XVII "thus signal[s] a jurisdictional distinction between reservation and ceded land." 522 U.S. at 350; see Pet. App. 239-240 (observing that Article XVII "acknowledged the continued existence of two distinct categories of land to which different laws might apply").

Article V of the 1894 Act provided a mechanism for funding, from interest due the Tribe on proceeds from the sale of ceded lands, various post-cession tribal activities, such as the care of "orphans, and aged, infirm, or

other helpless persons of the Yankton tribe," schools and educational programs, and "courts of justice and other local institutions for the benefit of said tribe." 28 Stat. 315 (Pet. App. 341). Article XI provided an additional source of funding for those activities from the sale of lands of tribal members who died intestate. 28 Stat. 317 (Pet. App. 344). The court of appeals recognized that those provisions, which "clearly foresaw continued tribal activity in providing for the needs of the Yankton Sioux," militate against a determination that Congress intended to disestablish the Reservation. Pet. App. 239.[4]

The record of the negotiations of the 1892 Agreement between the United States Commissioners and the Yankton Sioux likewise provides no indication of an intent to disestablish the Reservation. The Commissioners repeatedly informed the Tribe during the negotiations that they had one primary purpose—to purchase the Tribe's unallotted surplus lands. Pet. App. 232-234; (citing S. Exec. Doc. No. 27, 53d Cong., 2d Sess. 48 (1894) (Negotiation Record)). That purpose was consistent with the continued existence of a Reservation. As the district court observed, "[a]t no point in the Commissioners' reports is there any mention, by a Commissioner or by a Yankton Sioux, of any anticipated change in the reservation boundaries or of a disestablishment or termination of the Yankton Sioux Reservation." *Id.* at 284.

The negotiation records were submitted to Congress by the Secretary of the Interior to support ratification of the 1892 Agreement. Pet. App. 232. The congressional debates on the ratification did not address the status

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[4] As the court of appeals noted (Pet. App. 238-239), the fund referred to in Articles V and XI "was never actually created, but the fact that it was provided for in the statute has relevance on the question of intent."

of the allotted lands within the Yankton Sioux Reservation. See, *e.g.*, 26 Cong. Rec. 6426 (1894) (statement of Rep. Pickler of South Dakota) ("We simply provide in this bill how these 168,000 acres of land acquired from the Indians shall be disposed of."); cf. *Yankton Sioux Tribe*, 522 U.S. at 353 (observing that "[t]he legislative history itself adds little").

Subsequent actions by Congress, and the on-the-ground-facts, likewise do not support a conclusion that the Reservation was disestablished. Pet. App. 244. As the court of appeals explained, Congress's decision in 1929 to return certain reserved lands to the Tribe provides some additional evidence that Congress "always intended" to provide a "property site" for tribal-support activities. See *id.* at 244-245. The Tribe additionally presented uncontested evidence that it maintained a tribal police force and an independent judicial system following passage of the 1894 Act. *Id.* at 246 & n.12.

In sum, the court of appeals correctly concluded that no clear indication of congressional intent to disestablish the Yankton Sioux Reservation could be found in the text of the 1894 Act and the 1892 Agreement, in the legislative history, or in the surrounding circumstances.[5] Pet. App. 241. Not only is there no reason for the Court to revisit that conclusion, but, contrary to the State's contention (State Pet. 36-37), review by this Court would

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[5] The State appears briefly to suggest (State Pet. 24-26) that this Court's decision in *Yankton Sioux Tribe*, in combination with the State's interpretation of the record, demonstrates that the Reservation was, in fact, disestablished. The State misinterprets *Yankton Sioux Tribe*. The Court in that case expressly declined to reach the disestablishment issue, 522 U.S. at 358, and recognized that certain provisions of the 1854 Act cut *against* disestablishment, *id.* at 350. See p. 15, *supra*.

not provide any useful guidance to lower courts in deciding other Indian-country cases. Other cases would necessarily involve different treaties between the United States and the particular tribe; different statutes; different historical circumstances; different subsequent settlement activity; and different treatment of the opened lands by the United States, the State, and the relevant tribe. Cf. *Solem*, 465 U.S. at 469 ("[I]t is settled law that some surplus land Acts diminished reservations and other surplus land Acts did not.") (citations omitted). Certiorari is accordingly unwarranted.

2. Petitioners contend (State Pet. 16-26; County Pet. 16-35; SMRWMD Pet. 6-11) that the court of appeals' decision conflicts with the South Dakota Supreme Court's decision in *Bruguier* v. *Class*, 599 N.W.2d 364 (1999), and with this Court's decision in *DeCoteau* v. *District County Court*, *supra*.[6] Petitioners made the exact same contention in their previous petition for certiorari on the question presented here, which the Court denied. See 99-1490 Pet. 11-20; *South Dakota* v. *Yankton Sioux Tribe*, 530 U.S. 1261 (2000). The contention is mistaken.

a. Contrary to petitioners' assertion of a conflict between the decision below and the Supreme Court of South Dakota's decision in *Bruguier*, the actual holdings of the two cases are identical. Both hold that allotted lands within the exterior boundaries of the original

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[6] The Southern Missouri Recycling and Waste Management District additionally contends (SMRWMD Pet. 11-13) that the court of appeals' decision in this case conflicts with that court's previous decision in *Beardslee* v. *United States*, 387 F.2d 280 (8th Cir. 1967). Even assuming such a conflict existed, it would be for the court of appeals, not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Yankton Sioux Reservation now owned by non-Indians do not constitute "Indian country" under 18 U.S.C. 1151, and consequently that the State, not the United States and the Tribe, has primary jurisdiction over crimes committed on those lands.

In *Bruguier*, the defendant was convicted of a state criminal offense for committing a burglary in Pickstown, South Dakota, which is within the exterior boundaries of the original Yankton Sioux Reservation. 599 N.W.2d at 365. He subsequently sought habeas corpus relief, claiming that the offense occurred in Indian country, and thus that the State lacked jurisdiction over him. *Id.* at 365-366. The parties stipulated that the offense occurred on allotted land to which Indian title had been extinguished. *Id.* at 366. The land had been sold in fee to a non-Indian, and was neither trust land, a dependent Indian community, nor property held by the Tribe. *Id.* at 377-378.

In denying habeas relief, the South Dakota Supreme Court reasoned that the 1894 Act disestablished the Yankton Sioux Reservation. *Bruguier*, 599 N.W.2d at 378. But the court's actual holding was limited to the narrower issue presented in the case: whether the land on which the offense was committed constituted Indian country, and thus whether primary jurisdiction over the defendant's crime rested with the United States and the Tribe or, alternatively, with the State. The court acknowledged the limited scope of its holding, stating at the outset of its opinion: "Here we must decide the status of *allotted* lands, which have passed into non-Indian ownership." *Id.* at 365. The court concluded that such lands do not constitute Indian country. *Ibid.*

The court of appeals in this case likewise held that formerly allotted lands that now are owned by

non-Indians "are not part of the Yankton Sioux Reservation and are no longer Indian country." Pet. App. 247; see *id.* at 17. Thus, as the court of appeals recognized, *Bruguier* addressed "a category of land" that the court of appeals had "held was *not* part of a diminished reservation." *Id.* at 23 n.7 (emphasis added). Under the holdings of both the Supreme Court of South Dakota and the Eighth Circuit, the State had primary jurisdiction over the offense at issue in *Bruguier*, and indeed has jurisdiction over offenses on *all* allotted lands that have passed out of trust status and are now in non-Indian ownership.

Nor is any disagreement evident between the court of appeals and the Supreme Court of South Dakota that trust lands within the original exterior boundaries of the Reservation *are* Indian country. The Supreme Court of South Dakota stated that the land at issue in *Bruguier* was not trust land, 599 N.W.2d at 378, and repeatedly recognized that certain lands might be Indian country even without a formal reservation, see *id.* at 370-371, 376, 378. For reasons explained at pp. 24-30, *infra*, federal law does indeed classify the trust lands as Indian country irrespective of formal reservation status.

The decision of the court of appeals in this case thus does not present a "conflict[] with a decision by a state court of last resort," Sup. Ct. R. 10(a), of the sort that warrants this Court's review. The Court has stated that it "reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (citation omitted)). Where, as here, there is a difference in reasoning but not result, this Court's intervention is unwarranted.

b. The court of appeals' decision also does not conflict with this Court's decision in *DeCoteau*, which held that another South Dakota Reservation, the Lake Tra-

verse Reservation of the Sisseton-Wahpeton Tribe, had been disestablished.

This Court has cautioned against automatically extending a decision holding that one reservation was disestablished or diminished to another reservation, explaining that the "effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage." *Hagen*, 510 U.S. at 410 (quoting *Solem*, 465 U.S. at 469); see *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) (rejecting, as contrary to "basic principles of treaty construction," the argument that "similar language in two Treaties involving different parties has precisely the same meaning," because "the historical record" and "the context of the treaty negotiations" must be examined "to discern what the parties intended by their choice of words"). Here, the text of the surplus land Act and the circumstances surrounding its enactment differ in several significant respects from those in *DeCoteau*.

As for the statutory language, although both surplus land Acts provide for a cession of surplus lands for a sum certain, the 1894 Act concerning the Yankton Sioux Reservation contains provisions that do not have counterparts in the Act of Mar. 3, 1891, ch. 543, 26 Stat. 989 (Sisseton-Wahpeton Act), that ratified the agreement with the Sisseton-Wahpeton Tribe. The Sisseton-Wahpeton Act did not have a provision analogous to Article VIII of the 1894 Act, which reserved from sale to settlers those surplus lands occupied by the United States for Indian agency, school, and other purposes. 28 Stat. 316; see *Yankton Sioux Tribe*, 522 U.S. at 350 (stating that such a provision counsels against finding the Reservation disestablished). The Sisseton-

Wahpeton Act also did not have a provision analogous to Article XVII of the 1894 Act, which expressly prohibited the sale of liquor on both the newly ceded lands and on "any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians." 28 Stat. 318; see *Yankton Sioux Tribe*, 522 U.S. at 350 (suggesting that such a provision draws a "jurisdictional distinction" between ceded lands and reservation lands). Nor did the Sisseton-Wahpeton Act have provisions analogous to Articles V and XI of the 1894 Act, which provided a mechanism to fund schools, courts, and "other local institutions for the benefit of [the] tribe." 28 Stat. 315, 317. Accordingly, the 1894 Act, in contrast to the Sisseton-Wahpeton Act, contemplated a continuing role for the United States and the Tribe in the area and a jurisdictional distinction between ceded and other reservation lands.

As for the surrounding circumstances, the Sisseton-Wahpeton expressed their understanding, with a clarity that the Yankton Sioux did not, that the cession of their surplus lands and the allotment of their remaining lands would terminate their Reservation. As the court of appeals observed, "[t]he background of the Lake Traverse agreement was very different from that of the 1894 Act, * * * because the tribal members there had expressed their clear desire to terminate their reservation." Pet. App. 220-221. For example, this Court noted that spokesmen for the Sisseton-Wahpeton Tribe had stated that "[w]e never thought to keep this reservation for our lifetime," *DeCoteau*, 420 U.S. at 433; that "[w]e don't expect to keep [the] reservation," *ibid.*; and that "[t]his little reservation * * * was given us as a permanent home, but now we have decided to sell," *id.* at 436-437 n.16. In contrast, the "circumstances sur-

rounding the negotiation of the 1892 Agreement with the Yankton Sioux and the difficulty in obtaining tribal votes to ratify it are significantly different, and there was no expression by the Indians of an intent to eliminate their reservation." Pet. App. 221.

Finally, the Sisseton-Wahpeton Tribe negotiated for substantially more allotted acreage per capita than was provided by the Dawes Act or was received by the Yankton Sioux under the 1894 Act. The Dawes Act, pursuant to which the allotments to the Yankton Sioux were made, provided that heads of household were to receive 160 acres, single persons over 18 or orphans were to receive 80 acres, and other persons were to receive 40 acres. Pet. App. 262 (citing 24 Stat. 388). In contrast, each Sisseton-Wahpeton member, "regardless of age or sex," received a 160-acre allotment. *DeCoteau*, 420 U.S. at 435; see *id.* at 438 n.19 (quoting the Senate Committee Report on the Sisseton-Wahpeton agreement as explaining that "the departure from the general allotment act of 1887 in the case of these Indians is just and proper," principally because "the additional allotments are in lieu of any residue which, under their title, these Indians could have reserved for the future benefit of their families"). The court of appeals thus recognized that the agreement in *DeCoteau* differed significantly from the agreement here, because the Sisseton-Wahpeton, in "exchange" for the termination of their Reservation, "negotiated allotments for each individual, including married women." Pet. App. 221. The Yankton Sioux did not.[7]

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[7] The State argues (State Pet. 22) that present-day demographics also show a similarity between this case and *DeCoteau*. Even assuming present-day demographic evidence could suffice to show disestablishment in 1894, the State misinterprets the significance of the evidence

In sum, given the significant differences in the language of the surplus land Acts involving the Yankton Sioux Reservation and the Lake Traverse Reservation as well as in the circumstances surrounding their enactment, no conflict exists between the decision below and this Court's decision in *DeCoteau*.

3. The question presented by petitioners regarding the Reservation's disestablishment does not merit review for the additional reason that it is of little practical consequence. The only lands that the court of appeals found to be Indian country under 18 U.S.C. 1151(a) based on their reservation status were (1) allotted lands held in trust by the United States for tribal members; (2) lands acquired by the United States since 1934 and held in trust for the Tribe pursuant to the IRA; and (3) lands that were ceded to the United States under the 1894 Act but reserved for Indian "agency, schools, or other purposes," were later returned to the Tribe, and are now held in trust by the United States for the benefit of the Tribe. See p. 11, *supra*. All of these lands would be Indian country even if the Reservation *had* been disestablished, as petitioners contend.[8]

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here. As the figures cited by the State demonstrate, whereas Indians were less than 10% of the relevant population in *DeCoteau*, they make up roughly one-third of the population here. See Pet. App. 315 (district court emphasizing demographic differences between this case and *DeCoteau*).

[8] To the extent that the State's criticism (State Pet. 26-35) of the court of appeals' decision could be read to touch upon these alternative grounds for Indian-country status, such arguments are not encompassed within the question presented in the State's petition, which seeks review only of "[w]hether the Act of 1894 disestablished the Yankton Sioux Reservation." State Pet. i.

a. The vast majority of the land at issue (over 30,000 acres) falls within the first category enumerated above: allotted lands held in trust for tribal members. Pet. App. 12-13. Petitioners conceded below that even if this land were not reservation land under Section 1151(a), it would still be Indian country under Section 1151(c), which expressly addresses allotments. See *id.* at 28, 226. The State argues (State Pet. 27) that resolution of the disestablishment question is still important to the status of these lands, because, if there is no reservation, then these lands would cease to be Indian country if they were ever removed from trust status. But as a practical matter, very little of this land has been removed from trust status in recent years, and there is little reason to expect that much, if any, of it will be in the near future. See Gov't C.A. App. 175-197 (less than one allotment has been removed from trust in each of the last two decades).

b. Most of the land at issue that does not fall into the first category falls within the second: some 6000 acres of lands placed into trust under the IRA. Pet. App. 12-13. The court of appeals correctly concluded that this category of land is Indian country whether or not the formal Reservation was disestablished. *Id.* at 36-37. The IRA authorizes the Secretary of the Interior to acquire "land for Indians" "within *or without* existing reservations." 25 U.S.C. 465 (emphasis added). The court of appeals recognized, quoting this Court's decision in *City of Sherill* v. *Oneida Indian Nation*, 544 U.S. 197, 221 (2005), that the IRA "provides the proper avenue for a tribe to reestablish sovereign authority over territory." Pet. App. 36 (brackets omitted); see *id.* at 36-37 (citing *Chase* v. *McMasters*, 573 F.2d 1011, 1018 (8th Cir.), cert. denied, 439 U.S. 965 (1978); *United States* v.

Roberts, 185 F.3d 1125, 1131 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (2000); and *Langley* v. *Ryder*, 778 F.2d 1092, 1095 (5th Cir. 1985), for the proposition that IRA trust lands are Indian country). Petitioners do not challenge that conclusion in their identical questions presented, and nothing this Court decides on the disestablishment issue on which petitioners do seek review would place these lands within state jurisdiction.[9]

c. The third category of land at issue—roughly 900 acres of "agency trust land," reserved for the Tribe's benefit in 1894 and restored to the Tribe under the 1929 Act—comprises less than three percent of the total land, Pet. App. 12-13, and thus would not by itself merit this Court's attention. In any event, this land would qualify as an "informal" or "de facto" reservation under this Court's precedents, even if no formal Reservation existed. In *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991), this Court considered the status of lands that were not within the boundaries of a formally recognized reservation but that were held in trust by the United States for the benefit of a tribe. The Court concluded that, because the trust land was "validly set apart for the use of the Indians as such, under the superintendence of the Government," the trust land "qualifie[d] as a reservation." *Ibid.* (citation omitted); see *United States* v. *John*, 437 U.S. 634, 649 (1978) (observing that "[t]here is no apparent reason why these [trust] lands, which had been purchased [by the United States] in previous years for the aid of those Indians, did not become a 'reservation,' at least for the purposes of federal criminal juris-

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[9] As noted below, see p. 27, *infra*, these lands also meet the standards for an informal reservation more generally.

diction at that particular time"); see generally *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (recognizing that Indian reservations, for purposes of 18 U.S.C. 1151(a), may be either "formal" or "informal").

The district court expressly recognized that the other two categories of land at issue in this case—the allotted trust lands and IRA trust lands—meet the standards for an informal reservation. Pet. App. 153-157. The district court concluded, based on the evidence presented, that "the federal government has validly set apart" those lands "for use of the Yankton Sioux Indians," observing that the federal Bureau of Indian Affairs handles leases and rents, and the Federal Bureau of Investigation exercises criminal jurisdiction, over that territory. *Id.* at 156. Similar considerations demonstrate that the agency trust land meets the standards for an informal reservation as well: the land was reserved for the purpose of providing "aid and education to tribal members so long as they were needed," *id.* at 21 (citation omitted); see 28 Stat. 316 (Pet. App. 342-343); was later "reinvested in the Yankton Sioux Tribe" when "no longer required for agency, school, and other purposes," Act of Feb. 13, 1929, ch. 183, 45 Stat. 1167; was exempted from allotment, thereby preventing its transfer to non-Indians, *ibid.*; see 69 Cong. Rec. 8837 (1928) (Sen. McMaster of South Dakota explaining that the lands would not be vulnerable to sale for taxes, and instead that the act would reinvest the lands "not for allotment but for reservation purposes, buildings, and so forth"); is held in trust for the Tribe with federal superintendence of leasing; and has been subject to federal criminal jurisdiction, Pet. App. 246.

d. Moreover, any tribal trust lands determined not to constitute either a formal or informal reservation under Section 1151(a) would satisfy the requirements of Section 1151(b) as a dependent Indian community. The district court expressly recognized that the federal government's treatment of the allotted trust lands and IRA trust lands qualified them as dependent Indian community under this Court's decision in *Alaska* v. *Native Village of Venetie Tribal Government*, 522 U.S. 520, 530 (1998). See Pet. App. 159-160. The analogous treatment of the agency trust land would similarly qualify it as dependent Indian community as well.

e. Because the lands in question would be Indian country if the formal Reservation no longer existed, there is no merit to the State's contention (State Pet. 35) that the court of appeals' decision has "created an untenable situation for those who must attempt to live in and govern the disputed area." Petitioners and amici raised a similar argument in support of rehearing below. Pet. App. 59. The court of appeals, in denying that request, quoted the government's observation that "despite a decade of experience with a * * * checkerboard Reservation" after the court of appeals' original ruling that the Reservation had not been disestablished, "this area of South Dakota has not experienced any of the problems described by the State, County, or *amici*." *Ibid.* (citation omitted).

In point of fact, because of the alternative grounds for Indian-country status of the lands at issue, the checkerboard pattern pre-dates the court of appeals' ruling on disestablishment, and would survive any decision on that issue by this Court. See, *e.g.*, Pet. App. 245-246 (noting longstanding federal exercise of criminal

jurisdiction over trust lands).[10] As this Court has previously recognized, a checkerboard jurisdictional pattern is not necessarily impracticable. See *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 265 (1992) (parcel-by-parcel determinations that state's tax assessor was required to make on checkerboard reservation were "not impracticable" and "do not differ significantly from those he must make off the reservation, to take account of immunities or exemptions enjoyed, for example, by federally-owned, state-owned, and church-owned lands"). And the evidence in this case—which shows that the federal government has long exercised criminal jurisdiction over lands found by the court of appeals to constitute part of the Yankton Sioux Reservation—demonstrates that the pat-

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[10] One amicus brief implies that the question presented nevertheless has relevance because the Tribe's regulatory authority differs depending upon whether the land at issue is Indian country under Section 1151(c) or because it is part of a reservation. See Charles Mix Electric Ass'n et al. Amicus Br. 10-11. None of the cases cited by the brief, however, expressly discusses Section 1151(c), and the brief omits to discuss whether the other alternative grounds (*e.g.*, informal-reservation status) for considering this land to be Indian country might also give rise to differences in tribal regulatory authority. *Ibid.* The courts below neither addressed nor recognized any relevant jurisdictional distinctions between different types of Indian country, and no such issue is presented for this Court's review. In any event, this Court's precedents suggest that the precise type of Indian country does not matter for jurisdictional purposes. The same general principles of immunity from state taxation apply, for example, on any land that constitutes Indian country, whether the land is a formal reservation, see *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 179-181 (1973); is held in trust for a Tribe but is not part of a formally designated reservation, see *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 511; or is an allotment still held in trust or restricted status, see *Sac & Fox Nation*, 508 U.S. at 123.

tern here has not proven to be unworkable. Pet. App. 245-246. For that reason, and because the current jurisdictional boundaries should remain irrespective of a decision by this Court on the question presented, certiorari is unwarranted.

4. Petitioners, and some of their amici, suggest that certiorari is necessary in order to address the status of an additional category of land, namely, allotted land that passed into non-Indian hands after 1948, when 18 U.S.C. 1151 was enacted. See State Pet. 34-35; County Pet. 19; Cities' Amicus Br. at 1 n.2 & App.; Colin Soukup et al. Amicus Br. 4-5; Wagner Community Sch. Dist. Amicus Br. 2. But as the court of appeals made clear in response to the rehearing petitions, no issue regarding such land was "actually litigated or decided in this case." Pet. App. 55. Indeed, the panel revised its original opinion to eliminate any possible implication that any such issue had been decided. *Id.* at 56. Because this is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), petitioners' arguments about this fourth category of land provide no reason to grant certiorari.

5. Finally, should the Court nevertheless decide to grant certiorari to address the disestablishment question, it should deny the Tribe's conditional cross-petition. The conditional cross-petition presents the question whether the present-day Reservation includes all lands that were within the original 1858 Reservation boundaries, except for those ceded to the United States in the 1894 Act. See Conditional Cross-Pet. i. The additional lands at issue in the Tribe's conditional cross-petition are once-allotted lands that passed out of trust status and were sold to non-Indians. The United States has long exercised jurisdiction only over trust lands, not

these. Pet. App. 246-247. Although the United States supported the Tribe's position on this issue, the question does not warrant certiorari. Like the disestablishment issue presented by petitioners, the issue the Tribe raises involves only the application of settled law to this particular case. See Sup. Ct. R. 10. There is no need to review the disestablishment question, but even if the Court did grant review of that question, there would be no need to expand the scope of review to include other aspects of the court of appeals' reservation-specific and fact-bound ruling.

As the court of appeals observed, "both sides have followed an all or nothing strategy" in this case. Pet. App. 248. The outcome now lies between those poles in a manner that essentially preserves the jurisdictional status quo as it has long existed. Review of any or all of the court of appeals' decision is unwarranted and would serve little purpose. The Court therefore should deny certiorari, just as it did 11 years ago when petitioners and the Tribe filed certiorari petitions raising the same issues at an earlier stage of this litigation.

CONCLUSION

The petitions for writs of certiorari should be denied. If any of the petitions are granted, the conditional cross-petition should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
IGNACIA S. MORENO
Assistant Attorney General
KATHRYN E. KOVACS
KATHERINE W. HAZARD
Attorneys

MAY 2011

(10) (9) (10) (3)

Nos. 10-929, 10-931, 10-932, and 10-1058

In The
Supreme Court of the United States

DENNIS DAUGAARD,
GOVERNOR OF SOUTH DAKOTA, et al.,
Petitioners,

v.

YANKTON SIOUX TRIBE, et al.

SOUTHERN MISSOURI RECYCLING
AND WASTE MANAGEMENT DISTRICT,
Petitioner,

v.

YANKTON SIOUX TRIBE, et al.

PAM HEIN, STATE'S ATTORNEY
OF CHARLES MIX COUNTY, et al.,
Petitioners,

v

YANKTON SIOUX TRIBE, et al.

YANKTON SIOUX TRIBE, et al ,
Cross-Petitioners,

v

DENNIS DAUGAARD,
GOVERNOR OF SOUTH DAKOTA, et al.

On Conditional Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS GOVERNOR AND ATTORNEY GENERAL

CHARLES D. MCGUIGAN*
Chief Deputy
Attorney General
State of South Dakota
Charles.McGuigan@state.sd.us
**Counsel of Record*

JOHN PATRICK GUHIN
KIRSTEN E. JASPER
Assistant Attorneys General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215

Counsel for Cross-Respondents Dennis Daugaard, Governor of South Dakota, Marty J. Jackley, Attorney General of South Dakota

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

The Yankton Sioux Tribe, in its Conditional Cross-Petition (CCP), argues that, if South Dakota's Petition in No. 10-929 is granted, bringing the question of whether the Yankton Sioux Reservation has been disestablished before the Court, it should be allowed to argue for its preferred configuration of a diminished reservation.

The Tribe has indicated that it will argue for its diminished reservation configuration on the same evidence which the State contends supports disestablishment. CCP 4. For the reasons set forth below, and in the State's Petition in No. 10-929, the Tribe's position on the merits is mistaken. The United States, in seeming agreement that the Tribe's position lacks merit, now urges denial of this Conditional Cross-Petition. Brief for the United States in Opposition, Nos. 10-929, 10-931, 10-932, and 10-958 at 32. Nonetheless, the equities and practicalities of the situation persuade the State to support the grant of this Conditional Cross-Petition, in the event that the Petition in No. 10-929 is also granted, to allow the full range of arguments to be presented.

STATEMENT OF THE CASE

In 1858 a "Yankton Sioux Reservation" of roughly 430,000 acres was created out of a larger territory. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 334 (1998). The reservation area was then subjected

to allotment pursuant to the Dawes Act and a subsequent act. *Id.* at 336. Roughly 262,000 acres were removed from common ownership and allotted to individual Indians; 168,000 acres were unallotted, and remained in common ownership. *Id.* This "unallotted" land was the "surplus land."

A Yankton Indian Commission was appointed in 1892 and, that same year, negotiated a "cession and sum certain" agreement with the Yankton Sioux Tribe by which the Tribe agreed to cede all of its unallotted land then held in common (the 168,000 acres known as "surplus land") for a sum certain of $600,000. 1894 Act, Articles I and II, Pet. App., No. 10-929 at 339. As a consequence, the Tribe retained no land in common. *Id.*; *Gaffey II*, Pet. App., No. 10-929 at 229-30. Because individual tribal members quickly disposed of their allotments and the United States itself sold allotments of deceased and incompetent Indians, the acreage held by individuals in allotted status declined from 262,000 acres to 43,358 acres by 1930. *State v. Greger*, 559 N.W.2d 854, 867 (S.D. 1997). By the time of the first trial in 1995, 232,000 of the original 262,000 acres of allotted land had been transferred in fee to non-Indians; the Tribe had acquired about 6,000 acres. *Yankton Sioux Tribe*, 522 U.S. at 339.

The Tribe's Question Presented asks this Court to recognize a "reservation" frozen in 1894, excluding only the surplus ceded land (on the basis of this Court's decision in *Yankton Sioux Tribe*, 522 U.S. at 358) but including all 262,000 acres of allotted land,

even though the Indian title to 88 percent of those lands has been extinguished and the lands have been conveyed to non-Indians. The result would be a "reservation" which would include roughly 30,000 acres of allotted lands owned by tribal members and 230,000 acres of lands owned by non-Indians. These parcels would be intermixed with the 168,000 acres of land ceded to the United States, acquired by non-Indians, and declared to be non-reservation by this Court in *Yankton Sioux Tribe*.

As unlikely as the configuration seems, it has appeared before, in very similar form, in this litigation. Immediately after this Court's decision in 1998, the Bureau of Indian Affairs apparently conceived it, and the District Court, at the urging of the Tribe and the United States, adopted a reservation configuration which consisted mainly of the allotted lands. *Gaffey I*, Pet. App., No. 10-929 at 253, 318-20. The Eighth Circuit, however, quickly overturned this decision. *Gaffey II*, Pet. App., No. 10-929 at 249. It is notable that, insofar as appears from the record, no map of this configuration had been prepared until after this Court's decision in *Yankton Sioux Tribe* in 1998. Even now, the Tribe fails to present a map to this Court which identifies the lands which it asserts would constitute "reservation" under the theory of the Conditional Cross-Petition.

DISCUSSION

The Tribe's Conditional Cross-Petition asks this Court to create a reservation configuration unknown to Indian law. Even so, the State does not object to the grant of the Petition, in the event that the State's Petition in No. 10-929 is granted, because, as the Tribe asserts, the arguments made in its Conditional Cross-Petition substantially overlap the arguments made by the other parties, and the Court's final determination may well benefit from consideration of all potential points of view.

A. The relief sought through grant of the Conditional Cross-Petition would create a configuration of a "reservation" never before seen in the law.

The reservation configuration sought by the Conditional Cross-Petition is unique. Except for the one year and two weeks in which the 1998 District Court's opinion, which adopted this "reservation," was effective, the Conditional Cross-Petitioners have not identified a single case, nor did the courts below, in which Congress was found to have created a "reservation" without external boundaries, which was comprised of roughly 90 percent fee land, 10 percent trust land of some kind, and intermingled with over 160,000 acres of non-reservation ceded land.

B. The Conditional Cross-Petition fails to articulate a coherent theoretical basis for granting the relief it seeks.

This case, from the first, has addressed the question of whether the Yankton Sioux Reservation has been disestablished or, at the least, diminished. This Court, in its 1998 decision, determined that the reservation *has* been at least diminished, and the exterior boundaries extinguished, by determining that the surplus land ceded to the United States by the 1894 Agreement was no longer "reservation." *Yankton Sioux Tribe*, 522 U.S. at 345, 347, 358. This Court found, however, that it "need not determine whether Congress disestablished the reservation altogether in order to resolve this case." *Id.* at 358. As demonstrated below, the opinions of this Court nonetheless illuminate the path which should be taken to ultimately resolve this case.

1. The operative language of the Yankton Agreement is precisely suited to "termination" but the Conditional Cross-Petition fails to even acknowledge that language.

The language of a surplus land agreement is the most important factor in determining whether disestablishment has taken place, and of that language, the "operative language" is of primary significance. *See Yankton Sioux Tribe*, 522 U.S. at 333; *Hagen v. Utah*, 510 U.S. 399, 412-14 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 593 n.15, 608 (1977).

The "operative language" of the Yankton Agreement is its "'cession' and 'sum certain' language" which this Court held is "'precisely suited' to terminating reservation status." *Yankton Sioux Tribe*, 522 U.S. at 344 (quoting *DeCoteau v. District County Court*, 420 U.S. 425, 445 (1975)). Virtually identical operative language in an 1891 Act had been held to disestablish the Lake Traverse Reservation in *DeCoteau*. For the Conditional Cross-Petition to succeed, it must, at a minimum, articulate a compelling reason to ignore the Yankton Agreement's operative language and this Court's interpretation of that language. The Conditional Cross-Petition fails to do so, because it fails even to *acknowledge* this language.[1]

2. The subsidiary language in the Yankton Agreement does not significantly undermine its operative language.

Instead of confronting the "operative language" of the 1894 Act, the Conditional Cross-Petition improperly assigns three other sections of the Act primary significance. CCP 13-14. This approach ignores *Yankton Sioux Tribe's* comparative analysis of the

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[1] The Tribe in its Brief in Opposition, Nos. 10-929, 10-931, 10-932, likewise fails to directly address the "cession and sum certain" language but does argue, *id.* at 13, that the "text of the 1894 Act" applied only to "'ceded'" lands, a clear error given that this Court and the Eighth Circuit have both found that the 1894 Act removed the 1858 reservation boundaries. *Yankton Sioux Tribe*, 522 U.S. at 345, 347; *Gaffey II*, Pet. App., No. 10-929 at 203, 223, 224, 248

effect of subsidiary and operative language in a cession agreement. In *Yankton Sioux Tribe*, the United States and the Tribe had "rest[ed] their argument" on the "saving clause in Article XVIII of the 1894 Act." 522 U.S. at 345. This Court, however, refused to give the "savings clause" such effect and limited it to preservation of annuities. *Id.* at 347-48. The Court's decision emphasizes the primacy of operative language even over very strong language in other subsidiary provisions, contrary to the position of the Conditional Cross-Petition.

In any event, the subsidiary provisions relied upon do not carry the weight assigned to them. The Conditional Cross-Petition argues that Article V of the 1894 Act provides for "continued funding of tribal courts of justice and other local institutions" and then strongly implies that this Court found "that provision" i.e., Article V, "reflects an expectation that the Tribe would maintain a sovereign existence" and so "'counsel[s] against finding the reservation terminated.'" CCP 13 (quoting *Yankton Sioux Tribe*, 522 U.S. at 350). In fact, *Yankton Sioux Tribe*, 522 U.S. at 350, does *not* discuss Article V, nor does Article V appear even to be mentioned in *Yankton Sioux Tribe*. Furthermore, Article V itself does *not* refer to "tribal courts of justice," as CCP 13 claims *See* 1894 Act, Art. V, Pet. App., No. 10-929 at 340-41. Rather, Article V refers to "courts of justice and other local institutions," *Id.* The reference is thus to support of "local," i.e., city, county and state, and not "tribal" courts,

contrary to the position of CCP 13. *Cf. South Dakota v. Bourland*, 508 U.S. 679, 697, n.16 (1993).

Next, the Conditional Cross-Petition relies on Article VIII which "reserved from sale to settlers" certain lands which had been "ceded" to the United States but were then "occupied by the United States for agency, schools and other purposes." CCP 13. *See* 1894 Act, Art. VIII, Pet. App., No. 10-929 at 342-43. The lands could be sold to settlers after they were "no longer required for such purposes." *Id.* at 343. The Tribe urges that Article VIII somehow demonstrates the continued existence of a "reservation" but the argument fails. Retention of such areas was "common, even for a terminated reservation." *Bruguier v. Class*, Pet. App. 10-929 at 187. Similar agency and school lands were reserved at the Lake Traverse or Sisseton Reservation, yet it, like areas of other reservations, was found disestablished. *See DeCoteau*, 420 U.S. at 435 n.16, 438 n.19; *Bruguier*, Pet. App. 10-929 at 187. *See also Rosebud*, 430 U.S. at 622 (Marshall, J., dissenting and referring to allowance for reservation of land in disestablished counties for "Indian schools, religious missions and service agencies"); *United States v. Pelican*, 232 U.S. 442, 446 (1914) (reservation of "school and mill lands" in area removed from reservation); 36 Stat. 440 (1910) (allowing, in Section 1, Secretary to reserve lands for "agency, school and religious purposes" in the area of Pine Ridge Reservation later held disestablished in *United*

States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975)).

Further, the "agency" lands were "unallotted" and "ceded," 1894 Act, Article I, Pet. App., No. 10-929 at 339; *Gaffey II*, Pet. App., No. 10-929 at 209, and this Court has found that "unallotted lands ceded" to the United States did not retain "reservation" status. *Yankton Sioux Tribe*, 522 U.S. at 342. Lands effectively declared to be *non-reservation* could hardly support the existence of a "reservation."

In addition, the Conditional Cross-Petition elevates the significance of the temporary retention of surplus lands. Such retention merely indicated that the United States perceived that it retained a responsibility to tribal members on the remaining "allotted lands" and in the area of the former reservation and that it would continue to supply services to them. *See Pelican*, 232 U.S. at 449-50. That is not enough to support the existence of a "reservation." As *Alaska v. Native Village of Venetie Tribal Government* found, the "mere provision of 'desperately needed' social programs" cannot support a finding of Indian country. 522 U.S. 520, 534 (1998). *See also* Report of Agent for Sisseton Agency (1900) (referencing, in 1900, at the Lake Traverse or Sisseton Reservation, disestablished nine years before in 1891, an "industrial boarding school," an "office" for the agent, and services provided by the

agency related to leasing and policing. 1998 JA 666-67.[8]

Finally, the Conditional Cross-Petition cites Article XVII, the liquor provision, as demonstrating the existence of a "reservation." CCP 13. *See* 1894 Act, Art. XVII, Pet. App., No. 10-929 at 347. This argument ignores the fact that this Court found that a similar liquor provision *supported* the disestablishment of Mellette County from the Rosebud Sioux Reservation. *Rosebud Sioux Tribe*, 430 U.S. at 613 n.47. The Conditional Cross-Petition also ignores the fact that liquor had been illegal in Indian country since 1832. Testimony of Herbert Hoover, 1995 Transcript at 73. Article XVII was unnecessary if the status of the lands had not been altered from reservation to non-reservation by the 1894 Act.

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[8] The Tribe at CCP 6 mischaracterizes the agency lands, labeling them "reserved agency trust lands" in 1929. These lands, however, had been ceded to the United States and were assuredly not in "trust" from 1894 until at least 1929. Indeed, the Solicitor found that the lands had been conveyed to the United States in 1894 "free and clear of all claims of the Indians." Opinions of the Solicitor, M-27671 (Mar. 1, 1934), 1998 JA 571. (Citations to documents follow the form set out in Petition, No. 10-929, at 5 n.2).

3. The relinquishment of all tribal land in common signaled the loss of a "critical component of reservation status" and not the retention of "reservation" status.

The Conditional Cross-Petition argues that the mere creation of allotments and the desire expressed by Government negotiators that individual Indians would retain their allotments signaled retention of "reservation" status. CCP 13-14. This approach misinterprets the occurrences of the late 1800's and the critical role of "land in common." After 1858, the Tribe held roughly 430,000 acres of land in common. Allotment is the process whereby the United States accomplished the permanent transfer of the part of the tribal land held in common to individual Indians. *Gaffey II*, Pet. App., No. 10-929 at 209-10; Nell Newton, Editor, *Cohen's Handbook of Federal Indian Law* (2005 Edition). Allotment diminished the area of land held in common by the Tribe by 262,000 acres. *See Yankton Sioux Tribe*, 522 U.S. at 336. The United States then obtained the "cession" of the remainder of the land in common – 168,000 acres – by way of a "sum certain" agreement in 1894. 1894 Act, Arts. I and II, Pet. App., No. 10-929 at 339. Therefore, after 1894, the Tribe retained *no* land in common. *Id.*; *Gaffey II*, Pet. App., No. 10-929 at 229-30. This is critical because, as *Yankton Sioux Tribe* finds, by failing to retain any land in common, a "critical component of reservation status" was lost. 522 U.S. at 346. Allotment and cession of land held in common worked in tandem to eliminate this critical

component of "reservation" status. *See id.*; *Bruguier*, Pet. App., No. 10-929 at 182-85.

The approach of the Conditional Cross-Petition also confuses the function and history of an "allotment" with that of a "reservation." While both are "Indian country," an "allotment" and a "reservation" are not the same. "Reservation" lands retain their reservation status regardless of their ownership; "allotments" on the other hand, retain their allotted status only so long as their "Indian title" is retained. 18 U.S.C. §§ 1151(a), (c). As *Venetie* finds, "allotments" are "parcels of land created out of a diminished Indian reservation and held in trust . . . for the benefit of individual Indians." 522 U.S. at 529. In the case of the Yankton area, the steady historical increase in state jurisdiction is the story of the surrender of 220,000 acres of individual allotments and their loss of "Indian title." *See Bruguier*, Pet. App., No. 10-929 at 190-94. *See also Yankton Sioux Tribe*, 522 U.S. at 357. The attempt of the Conditional Cross-Petition to make an allotment equivalent to a "reservation" should fail.

The Conditional Cross-Petition also incorrectly implies that the Government made a determined effort to cause tribal members to retain their allotments and that this somehow signaled "reservation" status for the allotments. The record shows, to the contrary, that roughly 230,000 acres of the original 262,000 acres of allotted land have left allotted status. *Yankton Sioux Tribe*, 522 U.S. at 339. Not only did tribal members quickly dispose of their allotments,

but the United States itself actively sought the end of allotted status through the regular sales of inherited lands and lands of non-competents to non-Indians, 1998 JA 821-34, through the so-called federal forced fee policy, 1995 Transcript 232; 1998 JA 920-23, by allowing the twenty-five year trust period to expire, 1998 JA 1163-64, and otherwise.

C. The jurisdictional history of the area is inconsistent with reservation status.

The Conditional Cross-Petition is bereft of evidence or even argument regarding the jurisdictional history of the lands for which it seeks to establish "reservation" status, although such history is important in the analysis. *See Yankton Sioux Tribe*, 522 U.S. at 357; *Rosebud*, 430 U.S. at 603-05. The federal and state courts have consistently found that the State, not the federal government or the Tribe, has exercised jurisdiction over non-Indian fee lands within the former boundaries. *See Yankton Sioux Tribe*, 522 U.S. at 357; *Gaffey II*, Pet. App., No. 10-929 at 245-47; *Bruguier*, Pet. App., No. 10-929 at 190-92. The tribal proposal, if adopted by this Court, would radically alter these arrangements and the State would be deprived of jurisdiction over all of the lands held in allotted status in 1894, even though over roughly 230,000 acres of former allotted land are now held in fee by non-Indians. Indeed, even the United States acknowledges that it has "long" not exercised

jurisdiction over non-trust lands. Brief for the United States in Opposition, Nos. 10-929, 10-931, 10-932, and 10-1058, at 30-31.

The Tribe's argument is doubly weakened in that, until recently, the Tribe itself had claimed only a small amount of land or reservation Its 1962 Constitution "defines the Tribe's territory to include only those tribal lands within the 1858 boundaries 'now owned' by the Tribe." *Yankton Sioux Tribe*, 522 U.S. at 357 (quoting Constitution and Bylaws of the Yankton Sioux Tribal Business and Claims Committee, Art. VI, § 1). Only in 1990, almost a century after the 1894 Act, did the Tribe amend its Constitution to claim "all lands and waters . . . within the exterior boundaries of the 1858 Treaty." 1998 JA 1129.[3]

CONCLUSION

The State has respectfully requested this Court to grant certiorari in its Petition in No. 10-929. The State agrees that grant of the Conditional Cross-Petition is appropriate in the event that its Petition is granted, in that such a grant will enable all parties to

[3] The Tribe is incorrect insofar as it asserts, without citation of evidence, that all the parties have become "adjusted" to the Eighth Circuit ruling. CCP 3, 11. That much is clear from the Amicus Briefs already submitted. The assertion, moreover, undermines, rather than supports, the grant of the relief requested by this Conditional Cross-Petition.

offer the most complete analysis of the facts and law possible.

Respectfully submitted,

CHARLES D. MCGUIGAN*
Chief Deputy Attorney General
STATE OF SOUTH DAKOTA

**Counsel of Record*

JOHN P. GUHIN
KIRSTEN E. JASPER
Assistant Attorneys General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215

Counsel for Cross-Respondents Dennis Daugaard, Governor of South Dakota; Marty J. Jackley, Attorney General of South Dakota

Supreme Court, U.S.
FILED
MAY 31 2011
OFFICE OF THE CLERK

No. 10-932

In the Supreme Court of the United States

PAM HEIN, STATE'S ATTORNEY OF CHARLES MIX COUNTY, SOUTH DAKOTA; KEITH MUSHITZ, MEMBER OF THE CHARLES MIX COUNTY, SOUTH DAKOTA, COUNTY COMMISSION, NEIL VONESCHEN, MEMBER OF THE CHARLES MIX COUNTY, SOUTH DAKOTA, COUNTY COMMISSION; JACK SOULEK, MEMBER OF THE CHARLES MIX COUNTY, SOUTH DAKOTA, COUNTY COMMISSION,

Petitioners,

v.

YANKTON SIOUX TRIBE AND UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF CHARLES MIX COUNTY

PAMELA HEIN
CHARLES MIX COUNTY
STATE'S ATTORNEY
P.O. BOX 370
LAKE ANDES, SD 57356
(605) 487-7441

TOM D. TOBIN
Counsel of Record
P.O. BOX 730
422 MAIN STREET
WINNER, SD 57580
(605) 842-2500
tobinlaw@gwtc.net

SCOTT GREGORY KNUDSON
BRIGGS AND MORGAN, P.A.
2200 IDS CENTER
MINNEAPOLIS, MN 55402
(612) 977-8400

Attorneys for Petitioner Charles Mix County

May 31, 2011

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STATEMENT

On remand from this Court's 1998 decision, the Eighth Circuit should have focused on whether the Tribe retained land in common after the 1894 cession. Contrary to the representations by the United States and the Yankton Sioux Tribe in oral argument before this Court, the Tribe did not retain any land in common, as the court of appeals finally acknowledged. However, on its own notion and without specific briefing, the court of appeals erroneously held that several hundred acres of noncontiguous "agency" land constituted an 18 USC 1151(a) reservation. To reach that result, the court of appeals necessarily had to find that Congress intended to do so in 1894.

In fact, the noncontiguous "agency" lands were *ceded* to the United States in 1894, the only proviso being that they be withheld from settlement until no longer needed. Even though *YST* held that *ceded* land did *not* retain reservation status, the court of appeals ignored that holding. It ruled instead that pursuant to an act passed thirty-five years later, the noncontiguous "agency" lands were to be given to the Tribe. Act of February 13, 1929, 45 Stat. 1167. The court of appeals failed to note that the 1929 Act was not implemented until *years* after that, and even then, only intermittently when isolated parcels of land were placed in trust by the United States.

> Tract T2081, Restored.. 1932, Tract TR2063, Restored...1938, Tract T2073, Restored...1955, Tract T2084, Restored ..1955, Tract T2082, Restored. 1955, Tract T2080 Restores...1955, and Tract T2054 Restores.. 1970.

Appendix of Appellee United States of America, Gov. Exhibit 201, *YST v. Podhradsky* (No. 08-1441 and 08-1488), at USA 120.

This sequence of events could not have resulted in an 18 USC §1151(a) reservation retroactive to 1894. Even the United States conceded that the court of appeals did not "articulate its rationale for that determination." Brief of U.S. at 20 in *YST v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999), *cert. denied*, 530 U.S 1261 (2000) (Nos. 99-1490 and 99-1683) Moreover, nothing in the 1929 documents even remotely suggests that such a possibility was ever considered. And the only documentation regarding the land transfer from the United States to the Yankton Sioux Tribe unequivocally points in the other direction.

In short, the "agency" reservation was a fanciful concept, useful as a foundation to which other isolated trust land could be linked to fashion an even larger "Yankton Reservation." The court of appeals left it to the district court to decide how much additional trust land should or could be added to the noncontiguous "agency" reservation, so as to constitute this even larger non-contiguous 18 USC §1151(a) reservation.

On remand, the district court held that all of the rest of the trust land (30,000 acres of original trust allotments and several thousand acres of land more recently placed in trust) should be designated as an 18 USC §1151(a) noncontiguous reservation under any one of several alternative theories. The court of appeals affirmed. No map of this purported reservation existed at the time of either decision.

In this entire process, the disestablishment decision of the South Dakota Supreme Court in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), was only summarily referenced.

SUMMARY

Although procedurally complicated, the remands in this case can be summarized simply. When the issue regarding the status of the Yankton Sioux Reservation was before this Court in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (*YST*), a unanimous Court provided the federal district court and the court of appeals with an opportunity. It was an opportunity to address a legitimate issue whether the Yankton Sioux Reservation had been wholly disestablished. The decisions of the district court and the court of appeals since that time do not reflect an appreciation of that opportunity or a proper respect for the principles reflected in the decisions of this Court.

A. In the initial remand, the district court ignored that *YST* held that the 1858 boundaries were disestablished. The district court resurrected the 1858 reservation boundaries again (a fact that the United States and the Tribe carefully avoid mentioning, although they advocated that resurrection). The district court also held that all the land except the ceded lands was within those 1858 boundaries. As a result, 230,000 acres of formerly allotted non-Indian fee land was also within those 1858 boundaries, in further derogation of *YST*.

B. The court of appeals reversed the district court on the 1858 boundary question (a fact that the United States and the Tribe also avoid mentioning). The court

of appeals recognized that *YST* squarely held that the 1858 reservation boundaries were disestablished. County App. I, 248.

The court of appeals reversed the district court with respect to the reservation status of the 230,000 acres of formerly allotted non-Indian fee land. Formerly allotted non-Indian fee land was not within the limits of the 1858 reservation boundaries because this Court held the 1858 reservation boundaries were disestablished. As a result, the court of appeals held Congress initially foresaw this result in 1894.

Significantly, the court of appeals then erroneously recognized some noncontiguous "agency" lands as an 18 USC §1151(a) reservation. As noted above, at the time, even the United States recognized that the court of appeals did not "articulate its rationale for that determination." As a result of this noncontiguous "agency" reservation, the court of appeals remanded the case back to the district court for a *third* time, to document the reservation status of the rest of the noncontiguous trust land.

C. Not surprisingly, the district court held that all of the rest of the trust land (36,000 acres) should be designated as a noncontiguous 18 USC §1151(a) reservation under any one of several alternative theories.

D. The court of appeals affirmed the district court on every acre and every alternative reservation status theory. In addition, the court of appeals, on its own notion, and without briefing, stated that thousands of acres of noncontiguous *fee* land should also be a part of this noncontiguous reservation, despite previously

limiting the scope of the remands to trust land and despite previously holding that none of the formerly allotted non-Indian fee land was within the limits of the reservation.

E. On rehearing, the offending language regarding the fee lands was deleted from the opinion of the court of appeals. A fifteen page explanation that danced around the deletion was set forth in a separate Order. Order, County App. I, 52-70.

F. This 37,000 acre reservation squarely conflicts with *Bruguier*, in which the South Dakota Supreme Court squarely held, consistent with all prior State and Federal precedent, including the decisions of this Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), and *YST*, that the Yankton Reservation was disestablished in 1894.

ARGUMENT

A. The overall consideration of the arguments in this case should be informed by the fact that the slate in this case is not clean. Sixteen years of litigation cannot simply be ignored. For example, in the beginning, the district court concluded that but for Article XVIII, the nearly conclusive presumption of "*disestablishment*" would have been controlling. *YST v. SMWMD*, 890 F.Supp. 878, 884 (D.S.D. 1995) (emphasis added).

This Court disposed of the Article XVIII argument in short order in *YST*, 522 U.S. at 345-349. But nowhere in its several subsequent opinions does the district court even mention the "nearly conclusive

presumption" or the operative language of the 1894 Act that is precisely suited to "[the] purpose [of *disestablishment*]." *YST*, 890 F Supp. at 884 (emphasis added). This is the light in which the conflicting variations of the Yankton Reservation, and the conflicting arguments in support of those variations, should be viewed.

B. There is no question that the disestablishment concession is the one thing the district court had right the first time. *DeCoteau* established the presumption of disestablishment, as this Court reiterated in *YST*. *YST*, 522 U S at 351. *DeCoteau* should have been controlling in the remands.

In *DeCoteau*, this Court noted five predominant factors.

1. "The negotiations leading to the 1889 Agreement show plainly that the Indians were willing to convey to the Government, for a sum certain, all of their interest in all of their unallotted lands." *DeCoteau*, 420 U.S. at 445.

2. "The Agreement's language, adopted by majority vote of the tribe, was precisely suited to this purpose." *Id.*

3. That "language is virtually indistinguishable from that used in other sum-certain cession agreements ratified by Congress in the same 1891 Act." *Id.* at 446.

4. The agreement was distinct from other agreements which the Court held had not changed reservation boundaries. *Id.* at 447-449.

5. "Until the Court of Appeals altered the status quo, South Dakota had exercised jurisdiction over the unallotted lands of the former reservation for some 80 years." *Id* at 449.

C. *YST* reviewed each of these factors. This Court noted that the terms of the 1894 Yankton Agreement "parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau*...." *YST*, 522 U.S. at 344. As in *DeCoteau*, "*all*" the unallotted lands were ceded to the United States for a sum certain in the Yankton Agreement; the language of the Yankton Agreement has been found to be " 'precisely suited' " to termination, and was adopted by a majority of the tribe, *id* ; the language is "virtually indistinguishable" from other cession and sum certain agreements identified in *DeCoteau;* the Yankton Agreement has been held to be "readily distinguishable" from agreements which preserved reservation boundaries, *id.* at 345; and South Dakota had no doubt exercised jurisdiction over the unallotted lands for more than 80 years. *Id.* at 357.

D The State initially described the similarities as "points of identity." There are eighteen points of identity between the two South Dakota agreements. Early on, the State made these arguments and noted a number of other points in the process. In a comparison of the two South Dakota statutes, the two acts are therefore strikingly similar. Nothing of substance submitted since that time detracts from this powerful analysis.

1. **Time period equivalent.** Sisseton-agreement approved 1891, 26 Stat. 1035 (1891); Yankton-agreement approved 1894, 28 Stat. 286 (1894).

2. **Allotment under General Allotment Act.** Sisseton, 26 Stat 1035, 1036; Yankton, 28 Stat. 286, 314.

3. **Similar acreage allotted.** Sisseton-256,000 acres, 1995 Exhibit 610; Yankton-262,000 acres, 1995 Exhibit 610.

4. **Similar per capita acreage allotted.** Sisseton-168 acres per capita, 1995 Exhibit 610; Yankton-152 acres per capita, 1995 Exhibit 610.

5. **Interior instructions to Commissioners equivalent.** Sisseton, letter from Commissioner of Indian Affairs of August 13, 1889; Yankton, letter from Commissioner of Indian Affairs of July 27, 1892.

6. **Preambles equivalent.** Sisseton, 26 Stat. 1035, 1036, Yankton, 28 Stat. 286, 314.

7 **Cession language used in both.** Sisseton, 26 Stat. 1035, 1036, Yankton, 28 Stat. 286, 314.

8 **All unallotted lands ceded in both.** Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 314.

9. **Sum certain language used in both.** Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 315.

10. **Entry subject to homestead and townsite laws in both.** Sisseton, 26 Stat. 1035, 1036; Yankton, 28 Stat. 286, 319.

11. **Missionaries allowed to purchase lands in both.** Sisseton, 26 Stat. 1035, 1037; Yankton, 28 Stat. 286, 316.

12. **School lands granted in both.** Sisseton, 26 Stat. 1035, 1039; Yankton, 28 Stat. 286, 319.

13. **United States retained an agency and schools in both.** Sisseton, 26 Stat. 1035, 1037; *DeCoteau*, 420 U.S. at 435 n.16; *Id* at 438 n.19; Yankton, 28 Stat. 286, 316; *YST*, 522 U.S. at 336.

14. **Allotments throughout former reservation in both.** Sisseton, *DeCoteau*, 420 U.S. at 428; Yankton, *YST*, 522 U.S. at 326.

15. **Presidential proclamation opening reservation referred to "cession language" in both.** Sisseton, 27 Stat. 1017; Yankton, *YST*, 522 U.S. at 354.

16. **Presidential proclamation opening reservation referred to "Schedule of lands within ... the Reservation ..." in both.** Sisseton, 27 Stat. 1017, 1018 (1892); Yankton, 29 Stat. 865, 866 (1895).

17. **State assumed virtually unquestioned jurisdiction in both.** Sisseton, *DeCoteau*, 420 U.S. at 442, Yankton, *YST*, 522 U.S. at 357.

18. **Two situations generally treated in parallel fashion on maps.** Sisseton and Yankton, Exhibit 620, JA 412 (1901); Exhibit 621, JA 413 (1910); Exhibit 44, JA 549 (1909).

E In the last paragraph of the Brief for the United States in Opposition, the United States claims that "[t]he outcome now ..essentially preserves the jurisdictional status quo as it has long existed." BUSO, *Daugaard, et al. v. YST, et al.* (Nos. 10-929, 10-931 and 10-932), at 31. Nothing could be further from the truth. The jurisdiction the court of appeals fashioned in this case is premised on a noncontiguous 18 USC §1151(a) reservation boundary around every tract of trust land in the County (all trust allotments and all other trust land as well). This is not the jurisdictional status quo in this County or any county—not for a "long" time or any other time. It is unprecedented in South Dakota and everywhere else.

In stark contrast, the actual jurisdictional history of the Yankton area does not support any reference to 18 USC §1151(a) reservation boundary jurisdiction. Rather, it precisely tracks the jurisdictional history of other areas in South Dakota affected by similar cessions that also include trust allotments. The decisions of this Court in *DeCoteau* and *Rosebud*, and the decisions of the South Dakota Supreme Court cited with approval by this Court in those same decisions, clearly document the application of 18 USC §1151(c) and refute the claim of the United States.

1. *DeCoteau* described in detail the effect of cessions on Indian reservations or portions thereof Nothing in *DeCoteau* (or *YST* for that matter) supports the claim that the cession can be construed to affect only the land actually ceded, rather than the entire *area*. To the contrary, *DeCoteau* and *Rosebud Sioux Tribe* make clear that the entire *area* was affected.

When a cession extinguished reservation boundaries around an area, no 18 USC §1151(a) Indian country remains in that area. *DeCoteau* clearly held that 18 USC §1151(c) was the pertinent subsection that designated any Indian country remaining in such an area. *DeCoteau* described this result in the following manner.

> In such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments. 18 U.S.C. § 1151 (c). See *United States v. Pelican*, 232 U.S. 442.
>
> *DeCoteau*, 420 U.S. at 446-447.

Rosebud Sioux Tribe reached the same conclusion. In *Rosebud Sioux Tribe*, the Court applied the same analysis to reach the same result with reference to each area affected by each of the three Rosebud Acts.

> To the extent that members of the Rosebud Tribe are living on allotted land *outside* of the Reservation, they, too, are on "Indian country," within the definition of 18 U.S.C § 1151, [18 USC §1151(c)] and hence subject to federal provisions and protections.

Rosebud Sioux Tribe, 430 U.S at 615 n.48 (emphasis added).

The dissent of Justice Marshall in *Rosebud Sioux Tribe* repeatedly confirms this analysis. *Rosebud Sioux Tribe*, 430 U.S. at 616, 621 n.13 (Marshall, J., dissenting)(took from them ..three quarters of their reservation)(remove the opened areas from the reservation). *See also* 628, 630, 631, 632.

As a result, this is the all or none situation repeatedly referred to in the briefs and the oral argument in *YST*. The parties agreed either the area was all Indian country under 18 USC §1151(a), or none of the area was Indian country under 18 USC §1151(a).

F. Like the United States, the district court and the court of appeals blur the distinction between ordinary checkerboard jurisdiction under 18 USC §1151(c), which is temporary and lasts only until Indian title is extinguished, and the permanent checkerboard jurisdiction fashioned by the courts in this case, which is unprecedented and permanent until Congress addresses the issue. Neither the district court nor court of appeals acknowledge this permanence or dependency on Congress. Nor did the courts acknowledge the fact that this arrangement will result in many non-Indians owning fee property within the limits of the Yankton Indian reservation.[1]

G. The United States concludes its brief in a consistent fashion—consistent in that it does not accurately discuss the previous Order of the Court in this case denying certiorari. Immediately before its conclusion, the United States suggests that this Court deny certiorari "just as it did" in the past. BUSO, *Daugaard, et al. v. YST, et al.* (Nos. 10-929, 10-931 and 10-932), at 31. In that last case, the United States

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[1] Initially, the district court quoted a 1969 Interior opinion that recognized 18 USC §1151(c) jurisdiction in the Yankton area. The 1969 opinion cited the *DeMarrias* decisions and previous State and Federal cases in South Dakota that recognize 18 USC §1151(c) jurisdiction *YST*, 890 F Supp. at 888 It also cited *Beardslee v. United States*, 387 F 2d 280, 287 (8th Cir. 1967), ("checkerboarding in non-reservation land"). *See Beardslee* excerpts in Petition and Reply of SMRWMD at 11-13, 2-5

keyed on the interlocutory nature of the case in the second sentence in that argument and repeated that theme throughout the entire argument. "[T]he court's decision does not warrant this Court's review, at least not at this interlocutory stage." BUSO, *Gaffey*, 188 F.3d 1010, *cert. denied*, 530 U S 1261 (2000) (Nos. 99-1490 and 99-1683), at 8, 9, 19, 21 and 27.

The United States neglects to mention the interlocutory nature of the previous case. It was the central argument the United States submitted in support of that denial. In this case, no interlocutory argument of any substance has been submitted.[2]

CONCLUSION

Petitioner Charles Mix County respectfully requests the Court to grant its Petition.

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[2] The County focuses on the shifting arguments of the United States in the Petition at 3-4, 35-40. The County concludes that there is no basis to give any special credence to the position of the United States in cases of this nature *See also* Brief of County, *amicus curiae*, submitted in *YST* and reproduced in County App II, 460. Significantly, the BUSO does not respond to any of this.

Respectfully submitted,

PAMELA HEIN
Charles Mix County
State's Attorney
P.O. Box 370
Lake Andes, SD 57356
(605) 487-7441

SCOTT GREGORY KNUDSON
Briggs and Morgan, P.A.
2200 IDS Center
Minneapolis, MN 55402
(612) 977-8400

TOM D. TOBIN
Counsel of Record
P.O. Box 730
422 Main Street
Winner, SD 57580
(605) 842-2500
tobinlaw@gwtc.net

Attorneys for Petitioner Charles Mix County

(2) (2) (3)

Nos. 10-929/10-931/10-932

FILED
FEB 10 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DENNIS DAUGAARD,
GOVERNOR OF SOUTH DAKOTA, *et al.*,
Petitioners,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

SOUTHERN MISSOURI RECYCLING AND
WASTE MANAGEMENT DISTRICT,
Petitioner,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

PAM HEIN, STATE'S ATTORNEY OF
CHARLES MIX COUNTY, SOUTH DAKOTA, *et al.*,
Petitioners,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

AMICUS CURIAE BRIEF OF CHARLES MIX ELECTRIC ASSOCIATION, INC. AND ROSEBUD ELECTRIC COOPERATIVE, INC. IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

MICHAEL J WHALEN
MICHAEL J WHALEN LAW OFFICE, PROF. LLC
110 Kansas City Street
Rapid City, South Dakota 57701
Telephone: (605) 341-5352
Email: mwhalen@rapidnet.com
Attorney for Amici Curiae
Charles Mix Electric Association, Inc. and
Rosebud Electric Cooperative, Inc.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Pursuant to Supreme Court Rule 37(2), Charles Mix Electric Association, Inc. of Lake Andes, South Dakota, and Rosebud Electric Cooperative, Inc. of Gregory, South Dakota, hereby respectfully submit this brief as *amici curiae* in support of the Petitions for Writ of Certiorari filed by the State of South Dakota, Charles Mix County, and Southern Missouri Recycling and Waste Management District.

INTEREST OF *AMICI* COOPERATIVES[1]

Charles Mix Electric Association, Inc. ("Charles Mix Electric" herein) and Rosebud Electric Cooperative, Inc., ("Rosebud Electric" herein) are both non-profit rural electric distribution cooperatives incorporated in 1945 under South Dakota Law. Charles Mix Electric serves rural Charles Mix County. Rosebud Electric serves rural Gregory and Tripp Counties. The original (1858) Yankton Sioux Indian Reservation was located in what is now Charles Mix County, South Dakota. The original (1889) Rosebud Indian Reservation included what is now Gregory, Tripp, Lyman, Mellette and Todd Counties, South Dakota. These diminished reservations share a common history,

[1] The parties were notified ten days prior to the due date of this brief of the intention to file Written consent of all parties accompanies this brief No counsel for a party authored any part of this brief No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief Only the identified *amici curiae* made monetary contributions and funded the preparation and submission of this brief

especially with regards to treaty and statutory language, Indian allotments, ceded surplus lands, and subsequent white settlement. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977).

By South Dakota statute, each of these cooperatives serves an assigned territory. S.D.C.L. § 49-34A-42. Charles Mix Electric's service territory includes approximately 36,500 acres of "Indian country" on the east side of the Missouri River. Rosebud Electric's service territory includes approximately 88,000 acres of "Indian country" on the west side of the Missouri River. The Indian lands served by these two cooperatives are scattered in "checkerboard" fashion throughout their respective service territories. In the past several years the Yankton Sioux Tribe and the Rosebud Sioux Tribe have each sought to exercise regulatory authority over businesses located within the former (1858 and 1889) reservation boundaries. These efforts included business licensure, taxation, rate regulation, imposition of a tribal utility code, and establishment of a tribal utility commission.[2]

The *amici* cooperatives are currently regulated by both state and federal law which prohibit rate

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[2] See Appendices A and B, Title 11 and 20 of the "Law and Order Code of the Rosebud Sioux Tribe" See also Appendix C, May 27, 2009 correspondence to Rosebud Electric Cooperative, Inc , from Rosebud Sioux Tribe Utility Commission Office

discrimination within the same class of consumers. Under controlling law, the same rates must apply to tribal members and nonmembers regardless of location of service, i.e. fee, tribal, or trust lands. Cooperative law also requires that each class of consumers bears the operating costs and expenses required to furnish service to that class. *Lillethun v. Tri-County Elec. Cooperative, Inc.*, 152 N.W.2d 147 (N.D. 1967). Under the terms of United States Department of Agriculture guaranteed Rural Utility Service ("RUS") loans and federal regulations, distribution cooperatives are required to design and implement rates to provide sufficient revenue to:

(i) pay all fixed and variable expenses;

(ii) provide and maintain reasonable working capital; and

(iii) maintain, on an annual basis, minimum "coverage ratios" (TIER, DSC, OTIER, and ODSC) to ensure "reasonable security for and/or the repayment of loans made or guaranteed by RUS."[3]

See 7 C.F.R. § 1710.114. Failure to meet such requirements may result in default, acceleration of the debt, and operational "take-over" by RUS.[4]

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[3] RUS Standard Loan Contract, Article I, § 5.4

[4] RUS Standard Loan Contract, Article VII, § 7.1 and Article VIII, § 8.1.

The decision of the Eighth Circuit Court of Appeals in *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010), would arguably subject the *amici* rural electric cooperatives to utility regulation (including rate making) by the resident tribes; at least to the extent of the scattered tribal and trust lands. This is so because the Court in *Podhradsky* expressly held that Indian allotments and trust lands within a diminished Indian reservation retain their reservation status and constitute "Indian country" under 18 U.S.C. § 1151(a), and therefore fall under "the primary civil, criminal, and *regulatory* jurisdiction of the federal government and the resident Tribe rather than the states." *Id.* at 1006 (emphasis added).

For these *amici* cooperatives (and those similarly situated), the consequences of tribal regulation would be disastrous because tribal rates, rules, and procedures differ from those governing the other 85% to 90% of the consumers within the same service territory. The cooperatives would invariably find themselves at odds with one authority or another for discriminatory or disparate treatment within the same class of consumers. Although Tribal Utility Codes may defer to federal regulations and RUS loan provisions, there is no assurance that rates established by the Tribal Utility Commissions would be sufficient to meet the minimum standards required by RUS loans and federal regulations. Thus, these non-profit cooperatives could face default and foreclosure.

This intolerable situation is not confined to the *amici* cooperatives. In the past few years, the national trend toward tribal regulation of utilities has grown dramatically. In South Dakota alone, four Tribes have established tribal utility codes, taxes, and commissions.[5] Other Tribes have sought to impose gross revenue, sales, and/or business taxes upon electric distribution cooperatives for the privilege of doing business in diminished reservations.[6] Of the 28 rural electric distribution cooperatives in South Dakota, 14 serve tribal and trust lands within their respective service territories.[7]

The practical effect of the Eighth Circuit Court's holding in the *Podhradsky* case is to create innumerable "mini-reservations" within electric service territories where tribal utility commissions may impose rates and rules without regard to 85% to 90% of the other consumers within the same area and classification. For Charles Mix Electric and Rosebud Electric the situation is unmanageable.

ARGUMENT

I. HISTORICAL SUMMARY

The "tangled history" of the Yankton Sioux Reservation has been set forth in numerous federal and

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[5] Crow Creek Sioux Tribe, Oglala Sioux Tribe, Rosebud Sioux Tribe, and Standing Rock Sioux Tribe

[6] Sisseton-Wahpeton Sioux Tribe and Yankton Sioux Tribe.

[7] See Appendices D and E

state decisions. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998); *Perrin v. United* States, 232 U.S. 478, 34 S.Ct. 387, 58 L.Ed. 691 (1914); *Yankton Sioux Tribe v. United States Army Corps of Engineers*, 606 F.3d 895 (8th Cir. 2010); *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999); *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 99 F.3d 1439 (8th Cir. 1999); *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980), *cert. denied*, 451 U.S. 941, 101 S.Ct. 2024, 68 L.Ed.2d 329 (1981); *Yankton Sioux Tribe v. United States*, 623 F.2d 159 (Ct. Cl. 1980); *Bruguier v. Class*, 1999 S.D. 122, 599 N.W.2d 364; *State v. Greger*, 1997 S.D. 14, 559 N.W.2d 854; *State v. Thompson*, 355 N.W.2d 349 (S.D. 1984); *State v. Winckler*, 260 N.W.2d 356 (S.D. 1977); *State v. Williamson*, 87 S.D. 512, 211 N.W.2d 182 (1973); *Wood v. Jameson*, 81 S.D. 12, 130 N.W.2d 95 (1964); *State ex rel. Hollow Horn Bear v. Jameson*, 77 S.D. 527, 95 N.W.2d 181 (1959).

A brief summary of that history is as follows: The Yankton Sioux Indian Reservation was created by the 1858 Yankton Treaty of Cession. The reservation originally consisted of 430,495 acres in what is now Charles Mix County, South Dakota. With the passage of the General Allotment (Dawes) Act of 1887, the Yankton Sioux Reservation was partitioned into parcels ("allotments") assigned to individual tribal members. In 1892, the Tribe and the United States negotiated a second treaty, which Congress ratified in 1894 (the "1894 Act"). By this agreement and for a

"sum certain" ($600,000), the Tribe "ceded, sold, relinquished, and conveyed" all of its unallotted or "surplus" land (168,000 acres) to the United States. President Cleveland opened the unallotted land for settlement in 1895 and the area filled with white settlers. Tribal government quickly faded and became nonexistent. By 1913, Yankton Sioux tribal members held 70,000 acres. By 1930, tribal members owned only 43,358 acres. Of the 262,000 acres originally allotted, only about 15% remained in Indian hands. At present, total Indian holdings in the region consist of approximately 30,000 acres of allotted land and 6,500 acres of tribal land. Most of these remaining Indian lands are held in trust by the United States government for the benefit of individual tribal members and the Tribe itself. The process of "diminishment" of the Yankton Sioux Reservation is fully documented in both *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333-40, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) and *State v. Greger*, 559 N.W.2d 854, 856-59 (S.D. 1997).

II. CONFLICT WITH STATE SUPREME COURT

The holding of the Eighth Circuit Court in *Podhradsky* directly conflicts with the South Dakota Supreme Court's decisions regarding the former Yankton Sioux Reservation. The South Dakota Supreme Court held in *State v. Greger*, 559 N.W.2d 854 (S.D. 1997) that:

> For over one hundred years, federal and state authorities have treated the Yankton Sioux Reservation as diminished. By agreement of tribal members and an Act of Congress, all unalloted reservation lands were sold to the United States and opened for settlement in 1895. The United States Supreme Court in 1914 referred to the very area now in question as no longer part of the reservation, and, in four separate decisions, this Court concluded diminishment occurred. Statutory language, contemporary negotiations, land ownership, population patterns and "jurisdictional history" all support diminishment. After more than a century, no other expectation is reasonable – using the [United States] Supreme Court's "clean analytical structure," the evidence is clear: the Yankton reservation has been diminished.

Id. at 867.

A few years later and mindful of the United States Supreme Court decision in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), the South Dakota Supreme Court handed down its decision in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999). There, the State Supreme Court, using the traditional three factor analytical structure, held that the Yankton Sioux Reservation had been *disestablished* by the 1894 Act and that formerly allotted land did not qualify as "Indian

country" under 18 U.S.C. § 1151(a). *Id.* at 371-78. Further, in construing Section 1151 the State Supreme Court stated, " . . . Congress intended subsection (a) to apply to the closed area of reservations, and (c) to apply to allotted lands in open territory." *Id.* at 371; citing *State ex rel. Hollow Horn Bear*, 77 S.D. 527, 95 N.W.2d 181 (1959).

However, the Eighth Circuit Court in *Podhradsky* pointedly disregarded *Greger* and *Bruguier* and ruled that the Yankton Sioux Reservation "was never disestablished" and that allotments are part of the "continuing" Yankton Sioux Reservation and therefore qualify as "Indian country" under 18 U.S.C. § 1151(a). *Podhradsky*, 1010. Going further, the Court held that allotments still held in trust are land within the limits of an Indian reservation under the jurisdiction of the United States Government. *Id.*

Central to the Eighth Circuit Court's analysis was its determination that, "In the absence of any clear congressional intent to divest allotted lands on the Yankton Sioux Reservation of their reservation status, those [allotted] lands retained such status, and all outstanding allotments continue to be reservation under § 1151(a)." *Podhradsky*, 1017. Yet in *Bruguier*, the South Dakota Supreme Court concluded that the Congressional intent behind the language of the 1894 Act was "unmistakable" and that Congress intended to terminate the reservation. *Bruguier*, 377.

The obvious conflict between the South Dakota Supreme Court and the Eighth Circuit Court of Appeals

cannot be reconciled. In *Podhradsky* the federal appellate court dismissively commented that, "*Bruguier's* conclusion that the Yankton Sioux Reservation had been disestablished in 1894 was more sweeping than necessary for resolution of the matter at issue. . . ." *Podhradsky*, at 1005 n. 7. Such a perfunctory dismissal of Justice Konenkamp's careful scholarship in *Greger* and *Bruguier* tends to underscore the need to resolve the persistent conflict between South Dakota's highest court and the Eighth Circuit Court of Appeals.

III. *MONTANA v. U.S.*

The distinction between "1151(a) Indian country" and "1151(c) Indian country" is all important to the *amici* cooperatives because whether the lands in question are "within a reservation" is determinative of tribal civil and regulatory jurisdiction over non-Indian activities. *See Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981); *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997); and *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc., et al*, 554 U.S. 316, 128 S.Ct. 2709, 171 L.Ed.2d 457 (2008). It is settled law that tribes generally do not possess authority over non-Indians who come within their borders. *Montana*, 450 U.S. 544, 564-65 (1981); *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997). This is so because nonmembers have no part in tribal government and have no say in the laws and regulations that govern tribal territory. *Plains Commerce*

Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 371, 128 S.Ct. 2709, 2724, 171 L.Ed.2d 457, 477 (2008). However, *Montana* provides two exceptions: (1) a tribe may regulate, through taxation, licensing, and other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements; and (2) a tribe may exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Plains Commerce Bank*, 329-30, citing *Montana*, at 565.

Both *Montana* exceptions require that the activities of the nonmember occur on the reservation. *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998). ("The operative phrase is 'on their reservations'.") Neither *Montana* nor its progeny purports to allow Indian Tribes to exercise civil or regulatory jurisdiction over the activities or conduct of non-Indians occurring outside their reservations. *Id.* at 1091. Thus, for the *amici* cooperatives, the critical question is whether the trust allotments in the diminished Yankton Sioux Reservation are "within a reservation" under subsection (a) of 18 U.S.C. § 1151.

IV. "WITHIN A RESERVATION" vs. "RESERVATION STATUS"

The Court in *Podhradsky* departs from the plain meaning of 18 U.S.C. § 1151 in its determination that allotments retain their "reservation status" despite the removal of exterior reservation boundaries. It does so by straying from the literal and logical meaning of the words of the statute in favor of an attenuated theory of residual "reservation status".

18 U.S.C. § 1151 provides:

> [T]he term "Indian country", as used in this chapter, means
>
> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 was originally enacted to define federal *criminal* jurisdiction. Only by judicial fiat has

it come to have implications for tribal taxation and civil/regulatory jurisdiction. *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520, 527, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998) citing *DeCoteau v. District County Court for Tenth Judicial District,* 420 U.S. 425, 427, n. 2 (1975). In analyzing 18 U.S.C. § 1151, the South Dakota Supreme Court in *Bruguier v. Class,* 1999 S.D. 122, 599 N.W.2d 364, interpreted the statute to mean that subsection (a) encompassed those areas *within a reservation,* and that subsection (c) applies to those lands standing *outside the reservation boundaries*. *Bruguier*, 371. This common sense interpretation was made with due regard for and careful consideration of the United States Supreme Court's decision in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998). *See Bruguier v. Class*, 599 N.W.2d 364, 365 (S.D. 1999). For the South Dakota Supreme Court, the term "within the limits of any Indian reservation" meant exactly that – land within the delineated boundaries of a geographically identifiable reservation.

By contrast, the Eighth Circuit Court in *Podhradsky* couched much of its decision in terms of "reservation status". *Podhradsky*, 1008-10. In using "reservation status" rather than "within the limits of any reservation", the Eighth Circuit panel granted itself an interpretive license to disregard the fact that the boundaries of the former Yankton Sioux Reservation have unquestionably been "obliterated". *See, e.g., United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206,

63 S.Ct. 534, 87 L.Ed. 716 (1943). The Court of Appeals justified its departure from the plain meaning of 18 U.S.C. § 1151(a) by referencing *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), wherein the Court stated that, "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise". *Solem*, at 470, citing *United States v. Celestine*, 215 U.S. 278, 285, 30 S.Ct. 93, 54 L.Ed. 195 (1909). The defect in the *Podhradsky* Court's "reservation status" analysis is that in *Solem* the Supreme Court was not dealing with a *diminished* reservation. As the Court expressly found in *Solem*, "The Act of May 29, 1908, read as a whole, does not present an explicit expression of congressional intent to diminish the Cheyenne River Sioux Reservation." *Solem,* 465 U.S. 463, 476. The Court in *Podhradsky* carelessly borrowed the term "reservation status" from a case factually distinguishable from the instant case.

Moreover, the Eighth Circuit Court engaged in considerable legal wrenching to fit the "square peg" of trust allotments in the "round hole" of section 1151(a). It began with the correct assertion that allotted trust lands were "Indian country" under § 1151(c). From there, however, the Court in *Podhradsky* set a strident course to scale the "almost insurmountable presumption of diminishment" arising from the statutory language and historical context of the 1892 Agreement and 1894 Act.

Instead of giving due weight to the overwhelming evidence of diminishment, the Eighth Circuit Court turned a blind eye to such evidence and pursued its philosophically preferred conclusion that a continuing reservation existed. In particular, the Court in *Podhradsky* found that:

(A) "The simple act of dividing the reservation was insufficient to divest the allotted lands of reservation status". *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1008 (8th Cir. 2010).

(B) "The Tribe's willingness to cede to the United States its unallotted land does not indicate that the reservation status of allotted lands was also revoked." *Id.*

(C) "We have repeatedly stated that not every surplus land Act diminished the affected reservation." *Id.*

(D) "Simply stated, there is nothing in the historical and documentary record to indicate a congressional intent to terminate the reservation status of the allotted lands immediately upon ratification of the 1894 Act or the opening of the ceded territory to white settlement." *Id.* at 1009.

(E) "In the absence of such an intention, we must conclude that at the time of the [1894] Act those [allotted] lands retained the same reservation status they had enjoyed since the original 1858 Treaty." *Id.*

However, those findings ignored one simple fact: the reservation boundaries were removed under the plain language of the 1892 Agreement and 1894 Act. As pointed out by Justice Konenkamp in *Bruguier v. Class,* 1999 S.D. 122, 599 N.W.2d 364, "[T]he boundaries created by the 1858 Treaty no longer exist because no provision was made in the 1894 Act to delineate *any* boundary. . . ." *Id.* at 371 (emphasis added). The United States Supreme Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151, 100 S.Ct. 2578, 2587-88, 65 L.Ed.2d 665 (1980). That geographical component has generally been ignored in *Podhradsky.*

In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), the United States Supreme Court determined that:

> Article I of the 1894 Act provides that the Tribe will "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unalloted lands within the limits of the reservation"; pursuant to Article II, the United States pledges a fixed payment of $600,000 in return. This "cession" and "sum certain" language is "precisely suited" to terminating reservation status. See *DeCoteau, 420 U.S., at 445.* Indeed, we have held that when a surplus land Act contains both explicit language of cession, evidencing "the present and total surrender of all tribal interests," and a

provision for a fixed-sum payment, representing "an unconditional commitment from Congress to compensate the Indian tribe for its opened land," a "nearly conclusive," or "almost insurmountable," presumption of diminishment arises. *Solem, supra, at 470*; see also *Hagen, supra, at 411.*

The terms of the 1894 Act parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau, supra, at 445*, and, as in *DeCoteau*, the 1894 Act ratified a negotiated agreement supported by a majority of the Tribe. Moreover, the Act we construe here more clearly indicates diminishment than did the surplus land Act at issue in *Hagen*, which we concluded diminished reservation lands even though it provided only that "all the unallotted lands within said reservation shall be restored to the public domain." See *510 U.S., at 412.*

The 1894 Act is also readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries. In both *Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 355 (1962)*, and *Mattz v. Arnett, 412 U.S. 481, 501-502 (1973)*, we held that Acts declaring surplus land "subject to settlement, entry, and purchase," without more, did not evince congressional intent to diminish the reservations. Likewise, in *Solem*, we did not read a phrase authorizing the Secretary of the Interior to "sell and dispose" of surplus

> lands belonging to the Cheyenne River Sioux as language of cession. See *465 U.S., at 472*. In contrast, the 1894 Act at issue here – a negotiated agreement providing for the total surrender of tribal claims in exchange for a fixed payment – bears the hallmarks of congressional intent to diminish a reservation.

Id. at 344-45.

At most, the United States Supreme Court envisioned a severely diminished reservation; although it stopped short of deciding whether the reservation was fully "disestablished". ("We need not determine whether Congress disestablished the reservation altogether in order to resolve this case, and accordingly decline to do so." *Id.* at 358.) Nonetheless, such judicial restraint should not be mistaken for a license to create reservation boundaries where Congress specifically removed them a century ago.

Despite the Eighth Circuit Court's reliance on "reservation status" in *Podhradsky*, scant authority exists to support the theory that § 1151(a) applies where no reservation boundaries exist. Rather, the controlling case law consistently holds that Indian allotments outside reservation boundaries derive their "Indian country" status from their allotment character, not from residual "reservation status". *United States v. Stands*, 105 F.3d 1565, 1571-72 (8th Cir. 1997); *United States v. Pelican*, 232 U.S. 442, 449, 34 S.Ct. 396, 58 L.Ed. 676 (1914). For § 1151(a) to apply, there must be identifiable reservation boundaries. *See*

United States v. Celestine, 215 U.S. 278, 285-86, 30 S.Ct. 93, 54 L.Ed. 195 (1909); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357-58, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962); *Mattz v. Arnett*, 412 U.S. 481, 506, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973); *Solem v. Bartlett*, 465 U.S. 463, 467, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). Thus, the Eighth Circuit Court's "reservation status" approach is inapposite here where the boundaries have been removed by treaty and statute.

The Court's theory of "reservation status" without reservation boundaries, then, is akin to asserting that a shadow remains after the object casting the shadow has been removed. Justice Konenkamp of the South Dakota Supreme Court offers a less ethereal jurisdictional theory for 18 U.S.C. § 1151:

> If subsection (a) is to receive a literal interpretation, a patent to allotted lands within the limits of such a reservation which operated to extinguish the Indian title could not remove such a tract from Indian country, but under subsection (c) such a patent would so operate. Hence, it seems logical to believe that the Congress intended subsection (a) to apply to the closed area of reservation, and (c) to apply to allotted lands in open territory. *Hollow Horn Bear*, 77 SD at 533, 95 NW2d at 185. If the only Indian country remaining is land the Yankton Tribe acquired long after the 1894 Act, along with remaining Indian owned allotments under § 1151(c), then the

> Yankton Sioux Reservation may be considered congressionally terminated.

Bruguier v. Class, 599 N.W.2d 364, 371 (S.D. 1999).

Essentially, Justice Konenkamp finds there is no § 1151(a) "Indian country" within the former Yankton Sioux Reservation. His approach does no harm to federal and tribal criminal jurisdiction on allotted trust lands and agency property because such lands and property still qualify as "Indian country" under subsections 1151(b) and (c). Yet, the fee owners of former allotments and businesses providing goods and services to current trust lands are not subject to the civil or regulatory authority of the Yankton Sioux Tribe because such lands are not "within a reservation" as required by *Montana*.

In summary, the Eighth Circuit Court in *Podhradsky* contrived a jurisdictional theory which put reservation boundaries around each parcel of allotted trust land in order to render it more "durable" § 1151(a) "Indian country". *Podhradsky*, 1008. However, this theory problematically assigns "reservation status" to allotted lands which have not been "within the limits of any reservation" for more than 100 years. Absent any actual reservation boundaries, the Eighth Circuit Court in *Podhradsky* effectively created "mini-reservations" out of the hundreds of parcels of allotted lands scattered throughout Charles Mix County. By doing so, the Court usurped the sole and exclusive power of Congress to create Indian reservations. *Sioux Tribe of Indians v. United*

States, 316 U.S. 317, 326, 62 S.Ct. 1095, 86 L.Ed. 1501 (1942).

IV. THE AGENCY LAND

As discussed above, the Eighth Circuit Court in *Podhradsky* disregarded much of the United States Supreme Court's structural analysis in *South Dakota v. Yankton Sioux Tribe* in order to rule that the allotted lands retained their "reservation status". Moreover, the Eighth Circuit Court "cherry-picked" those few discrepant sentences within *South Dakota v. Yankton Sioux Tribe* which it felt supported its novel theory of a continuing reservation without boundaries. Specifically, the Eighth Circuit Court spotlighted the Supreme Court's statement that Article VIII of the 1894 Act reserved from sale those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes" and quoted *Solem v. Bartlett*, 465 U.S. 463, 474, stating that "[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation." *Podhradsky*, 1005.

However, in *Bruguier v. Class*, Justice Konenkamp specifically addressed the "agency, school, and other purposes" language of Article VIII of the 1894 Act. First, he noted that the land was originally reserved to the United States Government, not the Tribe. *Bruguier*, 599 N.W.2d 373 n. 15 (S.D. 1999). (The Tribe did not acquire the school and agency land until

February 13, 1929, when the Government returned it to the Tribe by Public Law No. 70-729, 45 Stat 1167.) Second, Justice Konenkamp explained:

> In keeping with the Dawes Act's twenty-five year trust period following the allotment process, setting aside government land for school and agency purposes was common, even for a terminated reservation. n. 16. In the 1891 treaty with the Sisseton-Wahpeton Tribes, it was understood that on the Lake Traverse Reservation, the United States would continue to own land for school and agency purposes. *See DeCoteau*, 420 U.S. at 435 n. 16, 95 S.Ct. at 1088 n. 16 ("Government should own the lands upon which the agency and school buildings are located."); *id.* at 438 n. 19, 95 S.Ct. at 1089 n. 19 ("'Indian title'" to lands occupied by the "'agency and missionary society'" will be "'extinguished'" (citation omitted)). Moreover, reserving such "lands for Indian schools, religious missions, and service agencies" did not preclude finding congressional intent to disestablish a part of the Rosebud Reservation. *See Rosebud Sioux Tribe v Kneip*, 430 US 584, 622, 97 S.Ct. 1361, 1381, 51 L.Ed.2d 660 (1977) (Marshall, J., dissenting).

Bruguier v. Class, 599 N.W.2d 364, 374 (S.D. 1999).

Thus, the "agency, school, and other purposes" language of the 1894 Act is not dispositive of whether Congress intended a continuing reservation. Moreover, such equivocal language does not countermand

the historical context, statutory and treaty language, expressed congressional intent, jurisdictional history, subsequent treatment, or contemporary demographics of the area; all of which point to a disestablished reservation.

VI. *BEARDSLEE v. U.S.*

The Eighth Circuit Court has previously interpreted 18 U.S.C. § 1151 subsection (a) and (c) to arrive at a construction of the statute markedly different than the Court's decision in *Podhradsky*. In *Beardslee v. United States*, 387 F.2d 280 (8th Cir. 1967), the defendant, an enrolled member of the Rosebud Sioux Tribe, killed his mother and half-brother on formerly allotted land situated in the town of Mission, South Dakota. Mission is located within the boundaries of the diminished Rosebud Indian Reservation and was therefore considered 1151(a) "Indian country" by the United States. The murder occurred at a house rented by the defendant's mother, but owned in fee by non-Indians. At trial, the defendant challenged jurisdiction on the basis that the site of the crime was formerly allotted land and had lost its "Indian country" status by reason of a 1912 patent to non-Indians. In *Beardslee*, the Eighth Circuit Court squarely addressed the substantive differences between "Indian country" under 18 U.S.C. §§ 1151(a) and 1151(c):

> The definition of clause (a) of § 1151 would seem clearly to include the town of Mission, and the site of the alleged offenses, for it is "within the limits" of the Rosebud

> Reservation "notwithstanding the issuance of" the 1912 patent. The defense, however, pivots its jurisdictional argument on clause (c), which would include, within the definition of Indian country, "all Indian allotments, the Indian titles to which have not been extinguished". It is then urged that, by inference, an Indian title which has been extinguished is outside the definition. We decide this issue against the defense. . . . We regard clause (c) as applying to allotted Indian lands in territory now open and not as something which restricts the plain meaning of clause (a)'s phrase "notwithstanding the issuance of any patent". Although this result tends to produce some checkerboarding in non-reservation land, it is temporary and lasts only until the Indian title is extinguished. The congressional purpose and intent seem to be clear. See *State ex rel. Hollow Horn Bear v. Jameson*, *supra*, pp.184-185 of 95 N.W.2d.

Beardslee v. United States, 387 F.2d 280, 285-87 (8th Cir. 1967).

Clearly, the *Beardslee* Court understood that § 1151(a)'s phrase "within the limits of any reservation" meant lands located within the geographically identifiable parameters of a reservation, whether fee or allotted land. Likewise, the Court in *Beardslee* recognized that allotted lands outside reservation boundaries fell within the purview of § 1151(c). Thus, the reference in *Beardslee* to allotted lands outside the bounds of a reservation as "*non-reservation land*"

is particularly instructive. If allotted trust land is not within reservation boundaries, it is § 1151(c) "Indian country" and not § 1151(a) "Indian country". Plainly, the *Podhradsky* Court's efforts to contort § 1151(c) allotments into § 1151(a) reservation land contravenes the plain meaning of the statute as well as existing case law.

CONCLUSION

The *amici* rural electric cooperatives are rightfully concerned that the Eighth Circuit Court's decision in *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010), has brought them to the brink of a regulatory disaster. Discriminatory utility regulation by differing Tribal Utility Commissions, each with the power to set rates and impose taxes, threatens the ability of these electric distribution cooperatives to provide service and power to its customers, including tribal members and entities. "Checkerboard" utility regulation within diminished Indian reservations not only violates basic principles of cooperative law, but also engenders never-ending litigation in tribal, state, and federal courts. This unmanageable situation is the result of the *Podhradsky* Court's misapprehension of established jurisdictional case law and disregard of the plain meaning of 18 U.S.C § 1151. Moreover, the decision in *Podhradsky* has the practical effect of putting reservation boundaries around innumerable allotments which have not been "within a reservation" for more than 100 years. Compelling reasons

exist for the Supreme Court to grant the Petitions for Writ of Certiorari, to-wit: the holding in *Podhradsky* conflicts with numerous decisions of the State Supreme Court and prior decisions of the Eighth Circuit Court of Appeals and the United States Supreme Court.

Dated this 10th day of February, 2011.

MICHAEL J. WHALEN
MICHAEL J. WHALEN LAW OFFICE, PROF. LLC
110 Kansas City Street
Rapid City, South Dakota 57701
Telephone: (605) 341-5352
Email: mwhalen@rapidnet.com
Attorney for Amici Curiae Charles Mix Electric Association, Inc. and Rosebud Electric Cooperative, Inc.

APPENDIX A

Law and Order Code of the Rosebud Sioux Tribe

Additions to code received: 2004

TITLE ELEVEN - TRIBAL TAX CODE

Chapter 1 – Legislative Findings and Purpose
Chapter 2 – General Provisions
Chapter 3 – Tribal Tax Commission
Chapter 4 – Appeals
Chapter 5 – Enforcement
Chapter 6 – Penalties and Interest
Chapter 7 – Retail Sales and Service Tax
Chapter 8 – Use Tax
Chapter 9 – Cigarette Tax
Chapter 10 – Contractors Excise Tax
Chapter 11 – Land Use Tax
Chapter 12 – Business Licences

CHAPTER 1: LEGISLATIVE FINDINGS AND PURPOSE

Sec. 101 Sovereign Power to Tax – The power to levy taxes and similar exactions is an inherent and essential part of the authority of any government. This power is therefore an aspect of the retained sovereignty of Indian tribes except where it has been limited or withdrawn by federal authority. The Rosebud Sioux Tribe is a sovereign Indian Tribe organized pursuant to the Act of June 18, 1934, 48 Stat. 948, as amended, and governed pursuant to a Constitution and By-Laws ratified on November 23, 1935, and approved by the Commissioner of Indian Affairs on

December 20, 1935, as amended from time to time thereafter. Pursuant to the Constitution and By-Laws, the Rosebud Sioux Tribe. This Code is enacted pursuant to the inherent sovereign tribal powers expressly delegated to the Tribal Council in Article IV, Section 1(h) of the Tribal Constitution, which authorizes the Tribal Council to levy taxes upon members of the tribe and to levy taxes or license fees upon non-members doing business within the Reservation.

Sec. 102 Benefits of Tribal Government – Among the benefits provided by the tribal government to tribal members and to non-members residing or conducting business within the Rosebud Reservation are the following: the provision of governmental services, including sewer and water systems, police and fire protection, and a Tribal Court system of general jurisdiction; the promotion and regulation of economic activities within the Tribe's sovereign jurisdiction; and the protection of Reservation lands and resources.

. . . .

Sec. 713 Tax on Utility Services – There is hereby imposed a tax of 4% upon the gross receipts from sales, furnishing, or service of gas, electricity, and water, including the gross receipts from such sales by any municipal corporation furnishing gas, and electricity, to the public in its proprietary capacity, except as otherwise provided in this Chapter; when sold at retail within the Reservation to consumers or users.

. . . .

APPENDIX B

Law and Order Code of the Rosebud Sioux Tribe

Additions to code received: 2004

TITLE 20 – UTILITIES

Chapter 1 – Legislative Findings, Purpose and Scope
Chapter 2 – General Provisions
Chapter 3 – Tribal Utility Commission
Chapter 4 – Powers and Duties of Commission
Chapter 5 – Duties of Public Utilities
Chapter 6 – Electric Utilities
Chapter 7 – Electric Utility Rates and Tariffs
Chapter 8 – Telecommunications Companies (Reserved)
Chapter 9 – Pipeline Utilities (Reserved)
Chapter 10 – Gas Utilities (Reserved)
Chapter 11 – Water Companies (Reserved)
Chapter 12 – Heating Utilities (Reserved)
Chapter 13 – Other Public Utilities (Reserved)
Chapter 14 – Procedure on Regulation
Chapter 15 – Civil Infractions

CHAPTER ONE

LEGISLATIVE FINDINGS, PURPOSE AND SCOPE

§20-1-101. Legislative Findings.

(1) **Sovereign Power to Regulate Utilities.** The power to regulate utilities is an inherent and essential part of the authority of any reservation tribal government. This power is therefore an aspect of the retained sovereignty of the Rosebud Sioux Tribe except

where it has been limited or withdrawn by federal law. The Rosebud Sioux Tribe is a sovereign Indian tribe organized pursuant to the Act of June 18, 1934, 48 Stat. 984, as amended, and governed pursuant to a Constitution and Bylaws ratified on November 23, 1935, and approved by the Secretary of the Interior, Harold L. Ickes, on December 16, 1935, as amended from time to time thereafter.

Pursuant to the Constitution and Bylaws, as amended, the Rosebud Sioux Tribal Council is the governing body of the Rosebud Sioux Tribe. This Title is enacted pursuant to the inherent sovereign tribal powers expressly delegated to the Tribal Council in Article IV, Section 1, Subsections (a), (c), (f), (g), (h), (i), (k), (m), (n), (t) and (u) of the Tribal Constitution, which authorize the Tribal Council to represent the Tribe and to negotiate with federal, state and local governments and with private persons, to purchase and otherwise acquire lands and other property for or on behalf of the Tribe and manage, permit, assign, lease, sell, exchange, encumber or otherwise deal with tribal lands and other property as authorized by law, to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in tribal lands or other tribal assets without the consent of the Tribe, to manage all economic affairs and enterprises of the Tribe, to levy taxes and license fees upon non-members doing business within the Reservation, to regulate and license all business and professional activities

conducted upon the Reservation, to exclude by ordinance from the restricted lands of the Reservation persons not legally entitled to reside therein, to enact ordinances providing for the maintenance of law and order and the administration of justice by establishing a tribal court system, to safeguard and promote the peace, safety, morals, and general welfare of the Tribe by regulating the conduct of trade and the use and disposition of property on the Reservation, to charter subordinate organizations for economic purposes, to enact resolution regulating the procedures of all the Tribal Council, all tribal agencies and tribal officials, to administer any funds within the control of the Tribe, and to delegate to subordinate boards or tribal officials any or all of the foregoing powers, subject to review by the Tribal Council.

(2) **Need For Adequate Utility Regulations.** As both the Indian and non-Indian populations within the boundaries of the Reservation increase, and as additional residential, commercial, governmental and agricultural activities multiply, the need for adequate utility regulations grows ever more serious. Inasmuch as the Reservation is checkerboarded with both trust land and nontrust land, and inasmuch as both trust land and nontrust land are crisscrossed by utility lines, pipelines, rail lines and rights-of-way of both investor-owned and nonprofit utilities, adequate protection of utilities, the Tribe, tribal members and nonmembers

requires that the Tribe regulate all utilities operating within the Reservation.

(3) **Demonstrably Serious Impact of Utility Activities Upon the Economic Security, Health and Welfare of the Tribe and Tribal Members.** The rural nature of the Reservation, the fact that many homes of tribal members, especially HUD financed homes, are "all electric," that is, heated solely by electricity, the lack of any other practical heat source for many tribal members and nonmembers, the fact that the health and very lives of many tribal members and nonmembers are dependent upon an assured flow of electricity during the harsh, subzero winter months, the lack of practical transportation of many elderly tribal members and nonmembers during the harsh, subzero winter months, the fact that tribal economic enterprises furnish the majority of jobs for both tribal members and nonmembers on the Reservation, the high cost of electricity within the Reservation, the urgency of minimizing the cost of electricity to the Tribe, tribal members and nonmembers and to economic enterprises owned by the Tribe and tribal members, all evidence the demonstrably serious impact of utility activities upon the economic security, health and welfare of the Tribe and tribal members.

(4) **Lack of State Jurisdiction.** The State of South Dakota lacks jurisdiction to regulate utilities within the Reservation for the

reason that state regulation of such utilities interferes with the right of the Tribe and tribal members to make their own laws and be ruled by them and for the additional reason that utility regulation is preempted by the Tribe and the federal government with respect to all HUD homes of tribal members, other homes and businesses of tribal members financed in whole or in part by the Tribe or the federal government, all tribal buildings and businesses of the Tribe financed in whole or in part by the Tribe or the federal government and all Bureau of Indian Affairs or other federally owned or operated buildings.

(5) **Unconstitutionality of State Utility Regulation Within the Reservation.** As applied, the statutes of the State of South Dakota purporting to regulate utilities operating within the Reservation and purporting to grant jurisdiction to the State Public Service Commission regulating utilities within the Reservation unconstitutionally deny utilities, the Tribe, tribal members and nonmembers equal protection under both state and federal law because they (a) exempt from regulation of the State Public Service Commission the rates, contracts, sufficiency of facilities, or rules and regulations, [of] any rural electric cooperative corporation or association or any utility owned and operated by the State or by any city, county, township or other political subdivision of the State, (b) assign service areas to each utility, including rural electric cooperative corporations or

associations, within which such utility is granted the exclusive right to provide service at retail price at each and every location at which it was servicing a customer as of March 21, 1975 and to every present and future customer within such area, (c) prohibit any utility, including rural electric cooperative corporations or associations, from providing service at retail price within the assigned service area of another utility unless such other utility consents in writing, but (d) do not grant similar rights, protections or exemptions to any utility owned and operated by any federally recognized Indian tribe or political subdivision thereof within the limits of its reservation.

(6) **Failure of State Law to Regulate Utilities Not Operated for Profit Within the Reservation.** Statutes of the State of South Dakota purporting to regulate utilities operating within the Reservation and purporting to grant jurisdiction to the State Public Service Commission are altogether inadequate in protecting either the Tribe, tribal members, nonmembers or any such utility because such statutes exempt from state regulation the rates, contracts, or sufficiency of facilities, or rules and regulations of any utility that is not operated for profit, and yet purport to authorize the State Public Service Commission to prevent extension of service to the Tribe, a tribal member or a tribal member's business on trust land, or to a tribal business on trust land, by any utility that is operated for profit or any rural

electric cooperative corporation or association that is not specifically assigned the specific portion of the Reservation in question as its exclusive service area. Such extension of service may be denied regardless of whether such service economically benefits the Tribe or tribal member or whether extension of such service will provide the Tribe or tribal member a more secure source of service. Such application of state law results in almost no state legal controls over whether any rural electric cooperative corporation or association operating within the Reservation charges excessive amounts for utility service, or discriminates against the Tribe or tribal members and nonmembers, and unconstitutionally deprives the Tribe, tribal members and nonmembers from choosing utility service from whichever utility is most economically beneficial and provides the most secure source of service.

(7) **Illegal Collection of State Taxes By Utilities.** Despite the fact that both tribal members and the Tribe are immune from state taxes for all utility services provided them within the Reservation, utilities operating within the Reservation have for many years illegally collected the state gross receipts tax and other state taxes upon utilities with respect to services provided to both tribal members and the Tribe within the Reservation. Such illegal collection of state tax cannot be expected to stop unless tribal regulation of such utilities prohibits it as a matter of tribal law.

(8) **Consensual Relations Between Utilities Operating Within the Reservation and the Tribe, Tribal Members and Nonmembers.** The Council finds that every utility which enters and operates within the Reservation, enters into consensual relations, commercial dealings and contracts with residents of the Reservation, Indian and non-Indian, and with the Tribe, to provide services, operate facilities, construct and erect pipelines, transmission lines, poles, towers and other improvements upon and across Reservation lands owned by Indians, non-Indians and the Tribe. The Council further finds that the services, rates, policies, procedures and practices of every utility located and operating upon the Reservation have a demonstrably serious impact which imperils the economic security, health, welfare and general well-being of the Tribe, its members, and all residents of the Reservation and that regulation of every such utility by the Tribe is a necessary and proper exercise of the sovereign authority of the Tribe. The Council further finds that regulation of such utilities located, operating or providing services upon the Reservation is an essential governmental function of the Tribe and that regulation of every such utility located, operating or providing services upon the Reservation by the State of South Dakota or any municipality or political subdivision of the State is an infringement upon the right of the Tribe to make its own laws and be governed by them and demonstrably imperils

the political integrity and right of self-government of the Tribe.

(9) **Utilities Have Easements Across Tribal Land.**

§20-1-102. Purpose.

The Council hereby declares it to be in the public interest that all utilities located, operating or providing services within the Reservation be regulated as hereinafter provided in order to provide all retail consumers of utility services and commodities within the Reservation with adequate and reliable services at reasonable rates, consistent with the financial and economic requirements of such utilities and their need to construct facilities to provide such services and commodities or otherwise to obtain utility supplies, to avoid unnecessary duplication of facilities which increase the costs of service to the consumer and to minimize disputes between utilities which may result in inconvenience or diminished efficiency in service to such consumers. The purpose of this legislation shall also be to regulate all utility policies located, operating or providing services within the Reservation with respect to matters other than rates, including connection of service, disconnection of service, reconnection, deposit and overdue payment charges and to prohibit discriminatory or unreasonable preferences or advantages to any consumer or group of consumers by providers of utility services.

The regulation of utilities within the Reservation by the Tribe pursuant to this Title shall be deemed exclusive and shall preempt all other regulatory authority with respect to all utilities located, operating or providing services within the Reservation.

§20-1-103. Benefits of Tribal Government.

Among the benefits provided by the tribal government to all utilities located, operating or providing services within the Reservation are the following:

(1) The provision of governmental services, including sewer and water systems, police and fire protection, and a Tribal Court system of general jurisdiction;

(2) The promotion and regulation of economic activities within the Tribe's sovereign jurisdiction; and

(3) the orderly development and protection of the Reservation lands, resources and communities.

§20-1-104. Territory, Persons and Property Affected.

To the extent not prohibited by federal law, this Title shall apply to the following:

(1) The Rosebud Sioux Reservation within the historical boundaries of the Reservation established in Section Two of the Act of March 2, 1889, 25 Stat. 888, including all

lands, islands, waters, roads, and bridges, or any interests therein, whether in trust or non-trust status and notwithstanding the issuance of any patent or right-of-way, and such other lands, islands, waters or any interest therein thereafter added to the Reservation;

(2) All trust or restricted land of the Tribe or any enrolled member of the Tribe situate[d] within the historical boundaries of the Reservation established in Section Two of the Act of March 2, 1889, 25 Stat. 888, including all lands, islands, waters, roads, or any interests therein, including Tripp, Mellette, Gregory and Lyman Counties; and

(3) All persons and property within any geographical area referred to in Subsections (1) and (2) that are subject to the jurisdiction and governmental power of the Tribe.

(4) Final adjudication by a court of competent jurisdiction that this Title does not apply to land, persons or property in specific circumstances shall not affect its application to land, persons or property in any other circumstances.

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POWERS AND DUTIES OF COMMISSION

§204-101. Jurisdiction and Powers of Commission.

(1) **General Jurisdiction of the Commission Over Utilities.** The general jurisdiction of the Commission shall extend to and include:

(a) Telecommunications companies engaged in the furnishing of telecommunications services, including telegraph and telephone companies engaged in the transmission of messages or conversations by voice or electronic means;

(b) Pipeline utilities engaged in the transportation of gas, oil, coal, and water;

(c) Electric utilities engaged in the generation and distribution of light or power;

(d) Gas utilities engaged in the distribution of natural, synthetic or artificial gas;

(e) Water companies for the storage and distribution of water for domestic or other beneficial use;

(f) Heating utilities engaged in the distribution of heat; and

(g) All other utilities that operate, maintain or control any equipment or facilities within the Reservation.

Nothing in this Title shall prohibit the Commission from making any order affecting rates, contracts, services rendered, adequacy or sufficiency of facilities, of any utility owned and operated by any state or by any political subdivision of any state or any utility that is not operated for profit.

(2) **Powers of Commission With Reference to Utilities.** The Commission shall have power to:

(a) Investigate all methods and practices of utilities or other persons subject to the provisions of this Title.

(b) Require utilities or other persons to conform to the laws of the Tribe and to all rules, regulations, and orders of the Commission not contrary to law.

(c) Require copies of reports, rates, classifications, schedules, and time tables in effect and used by such utilities or other persons and all other information desired by the Commission relating to such investigations and requirements to be filed with the Commission.

(d) Compel obedience to its lawful orders by proceedings of mandamus

or injunction or other proper proceedings, in the name of the Tribe, in any court having jurisdiction of the parties or of the subject matter, including the Tribal Court.

(e) Hold hearings on good cause shown or on its motion, and to provide notice thereof prior to hearing. Such notice shall he reasonable in view of the nature, scope, and importance of the hearing. Whenever it shall appear to the satisfaction of the Commission that all of the interested parties have agreed concerning the matter at hand, the Commission may issue its order without a hearing.

(f) Require, in its discretion, proof that no unreasonable profit is made in the sale of materials to or services applied for any utility by any firm or corporation owned or controlled directly or indirectly by the utility or any affiliate, subsidiary, parent, associate or any corporation whose controlling stockholders are also controlling stockholders of the utility, before permitting the value of such materials or services to be included in valuations or cost of operations for rate-making purposes. If unreasonable profits have been made in any such transactions,

evaluations of such materials and services may reduced accordingly.

(g) Employ and fix the compensation of rate experts, engineers, and all other expert help and assistance for rate increase application hearings, investigations, and proceedings relating to utilities, subject to Subsections (2)(h) and (2)(j). The expense of any hearings, investigations, and proceedings, and the compensation and actual expenses of any employees of the Commission while engaged in any such hearing, investigation, or proceeding shall, upon appropriate order of the Commission, be paid by the utility being investigated or involved in such hearing or proceeding. A utility liable for such costs and expenditures shall receive appropriate notice and opportunity to demand a hearing before the Commission.

(h) Retain and use the services of only the tribal attorneys or other attorneys designated by the Council upon a contract approved by the Council and the Secretary of the Interior.

(i) Employ and use the services of only the tribal accountants or other accountants designated by the

Council upon a contract approved by the Council.

(j) Cooperate with and receive technical and financial assistance from the United States or any state for any purposes relating to federal energy laws that deal with energy conservation, coal conversion, rate reform, and utilities subject to the jurisdiction of the Commission. The Commission shall also have the authority to file any reports, hold hearings, and promulgate regulations for any such purposes.

(k) Promulgate and enforce rules and regulations consistent with this Title.

(l) Employ and consult with such advisors regarding its duties as it may deem necessary.

(m) Require by regulation the filing of any forms or reports necessary for implementation of this Title.

(n) Examine under oath either orally or in writing any agent, officer, or employee of any utility subject to regulation under this Title, or any other witness with respect to any enforcement action authorized by this Title.

(o) Delegate to an individual Commissioner, or to the Director or other members of the Commission staff or Tribal staff, such of its functions as may be necessary to administer this Title efficiently; provided that the Commission may not delegate its powers to promulgate rules and regulations, or to hear or rule upon any complaints filed with the Commission pursuant to this Title.

(p) Adopt by regulation a schedule of fees and charges for services rendered relating to transcripts and the furnishing or certifying of copies of proceedings, files, and records.

(q) Adopt rules and regulations in furtherance of the purposes of this Title pursuant to §20-4-110.

(r) Exercise all other authority delegated to it by law, or as may be reasonably necessary in the implementation of any provisions of this Title.

Except as provided in this Title, the Commission may exercise one or more of the above powers, [in] its discretion, and may, by appropriate rule or regulation, issued after notice and hearing, assume regulatory authority over one or more classes of utilities within the Reservation. Failure to exercise one or more powers delegated under this Title shall not be deemed a waiver or affect

the ability to exercise such powers in the future.

(3) **Duties of Commission.** The Commission is hereby vested with the powers, rights, functions, and jurisdiction to regulate, in accordance with the provisions of this Title, every utility as defined herein. The exercise of such powers, rights, functions, and jurisdiction is prescribed as a duty of the Commission.

(4) **Power of Commission to Establish Rates.** The Commission shall supervise all rates, tariffs, and charges of all utilities located or operating within the Reservation. It shall have the power, after notice and hearing, to originate, establish, modify, adjust, promulgate, and enforce all rates, tariffs, and charges of all utilities. Whenever the Commission, after hearing, shall find any existing rates, tariffs, charges, or schedules unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of any of the provisions of this Title, the Commission by order shall fix reasonable rates, joint rates, wheeling rates, charges, or schedules to he followed in the future in lieu of those found to be unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of any provision of law.

(5) **Power of Commission to Regulate Services.** Whenever the Commission shall find, after hearing, that the rules, regulations, practices, equipment, appliances, facilities or

service of any utility or the methods of manufacture, distribution, transmission, storage, or supply employed by it are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the Commission shall determine the just, reasonable, safe, proper, adequate, or sufficient rules, regulations, practices, equipment, appliances, facilities, service or methods to be observed, furnished, constructed, enforced, or employed, and, after hearing, shall fix the same by its order, rule, or regulation. The Commission shall, pursuant to §20-4-110 and after hearing, prescribe rules and regulations for the performance of any service, or the furnishing of any commodity, of a character furnished or supplied by any utility. On demand and tender of rates, such utility shall furnish such commodity and render such service within the time and upon the conditions provided in such rules and regulations.

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§20-5-107. To Disconnect No Service During Cold Weather.

The Commission shall promulgate regulations setting our procedures for and limitations on a utility's disconnection of residential utility customers who are unable to pay for utility service during cold weather. Such regulations shall include the following:

(1) A definition of "cold weather" as being any time the temperature falls below -30 degrees Fahrenheit, including allowance for a wind chill factor.

(2) Coverage of any utility customer, whom the utility knows or has reason to know (i) whose household income is less than 185% of the federal poverty level; (ii) is bedridden or is otherwise suffering the effects of a serious, life-threatening disease, or (iii) for whom the disconnection of utility service would have other serious, life-threatening effects;

(3) A provision that a customer who pays the utility at least 10% of the customer's income or the full amount of the utility bill, whichever is less, in a cold weather month cannot be disconnected during that month; provided that for the purpose of this Subsection, the term "customer's income" means the actual monthly income of the customer except for a customer who is normally employed only on a seasonal basis and whose annual income is over 135% of the federal poverty level, in which case the customer's income shall be the average monthly income

of the customer computed on an annual calendar year basis.

(4) A provision that the 10% figure in Subsection (3) above must be prorated between energy providers proportionate to each provider's share of the customer's total energy costs whenever the customer receives service from more than one provider;

(5) A provision that a customer's household income does not include any amount received for energy assistance;

(6) Verification of income by the local energy assistance provider, unless the customer is automatically eligible as a recipient of any form of public assistance, including energy assistance, that uses income eligibility in an amount at or below the income eligibility in Subsection (2); and

(7) A provision that the customer receive, from the local energy assistance provider or other entity, budget counseling and referral to weatherization, conservation, or other programs likely to reduce the customer's consumption of energy.

§20-5-108. To Be Liable for Improper Action.

If a utility does, causes to be done, or allows any act, matter, or thing prohibited by this Title or if a utility fails to do any act required by this Title, such utility shall be liable to the person affected thereby for all loss, damages, and injury caused thereby or resulting

therefrom. Any person may bring an action in Tribal Court to recover for such loss, damage, or injury. If the finder of fact finds that the act or omission was willful, the Court, in addition to the actual damages, may award punitive damages. No recovery under this Section shall affect in any manner a recovery by the Tribe of any fine or penalty provided for in this Title or the power to punish for contempt.

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§20-7-103. Factors in Establishing Rate Adjustments.

In reaching its decision on any request for change in tariffs, rates, joint rates, wheeling rates, charges, fares, tolls, schedules, or classifications of an electric utility, the Commission may adopt, in whole or in part, those rates approved or allowed by the State Public Service Commission for the same type or classification of service provided to customers outside the boundaries of the Reservation and within the State. The Commission may adopt such state rates on an interim basis pending full investigation and collection and analysis of data relevant to such rates. Nothing in this Section shall be construed to be a consent to jurisdiction of the State, its agencies or political subdivisions, with respect to the regulation of utilities within the boundaries of the Reservation, such jurisdiction residing exclusively with the Tribe and the Tribal Utility Commission pursuant to the provisions of this Title. The interim adoption by the Commission of any tariff, rate, joint rate, wheeling rate, fare, toll, schedule, or classification established by the State Public Service Commission under this Section shall not affect or in any way limit implementation and enforcement by the Commission of any other provision of this Title relating to tribal regulation of electric utilities within the Reservation.

§20-7-104. Non-Interference with Federal Programs.

In establishing rates under this Chapter for any rural electric cooperative or similar entity operating or providing service within the Reservation; the Commission shall take into consideration the obligations of such electric utilities to the federal government, including the Rural Electrification Administration, and the requirements under federal law applicable to such obligations. Any rates established by the Commission with respect to cooperative electric utilities shall be established so as not to interfere with any federal loan requirements or other federal regulations relating to such electric utilities.

§20-7-105. Reasonable Rates.

Every rate made, demanded, or received by any utility; or by any two or more utilities jointly, shall be just and reasonable. Rates shall not be unreasonably preferential, unreasonably prejudicial or discriminatory, but shall be sufficient, equitable and consistent in application to a class of consumers. To the maximum reasonable extent, the Commission shall set rates to encourage energy conservation and renewable energy use. Any data as to reasonableness should be resolved in favor of the consumer.

APPENDIX C

[SEAL] *Rosebud Sioux Tribe* [SEAL]
Utility Commission Office
P.O Box 430
Rosebud Indian Reservation
Rosebud, South Dakota 57570
Phone: 605-747-4097 ◊ Fax: 605-747-4099
Toll free: 877-837-8729 ◊
Email: tuc99@gwtc.net

Bart Birkeland, Manager May 27, 2009
Board of Directors
Rosebud Electric Cooperative, Inc.
PO Box 439
Gregory, South Dakota 57533-0439
Fax 605-835-9649

Mr. Birkeland & Board of Directors,

The Rosebud Sioux Tribe is a sovereign Indian Tribe organized pursuant to the Indian Reorganization Act of June 18, 1934, as amended. Pursuant to the Constitution and By-laws of the Rosebud Sioux Tribe, the Rosebud Sioux Tribal Council is the governing body of the Rosebud Sioux Tribe. Pursuant to the inherent sovereign powers expressly delegated to the Tribal Council in Article IV, Section 1, Subsections (a), (c), (f), (g), (h), (i), (k), (m), (n), and (u) of the Tribal Constitution, the Rosebud Sioux Tribal Council enacted the Rosebud Sioux Tribe Law and Order Code Title 20, to regulate utilities operating within the boundaries of the Rosebud Sioux Tribe Indian Reservation. RST Law and Order Code Title 20 Chapter 2, Section 20-2-101(9), defines "Utility" as any person, corporation, or other legal entity, its

lessee, trustee, and receiver, now or thereafter located, operating within or providing services within the Reservation, or maintaining, or controlling within the Reservation, equipment, or facilities for furnishing at retail price telecommunications services; pipeline utilities engaged in the transportation of gas, oil, coal, and water; electric utilities engaged in the generation and distribution of light, heat, or power; gas utilities engaged in the distribution of natural, synthetic, or artificial gas; water companies for the storage and distribution of water for domestic or other beneficial use; heating utilities engaged in the distribution of heat; and all other utilities which operate, maintain, or control any equipment or facilities within the Reservation.

The Tribe creates and establishes the Tribal Utility Commission pursuant to RST Law and Order Code Title 20 Chapter 3 Section 20-3-101. The general jurisdiction of the Rosebud Sioux Tribe Utilities Commission shall extend and include electric utilities engaged in the generation and distribution of light and power. RST Law and Order Code Title 4 Section 20-4-101(c).

Rosebud Electric is a electric service provider, operating and providing electrical services engaged in the generation and distribution of light, heat or power, within the boundaries of the Rosebud Reservation and therefore meets the definition of "Utility" under RST Law and Order Code Title 20 Chapter 2, Section 20-2-101(9).

20-4-101(4) Power of Commission to Establish Rates. The Commission shall supervise all rates, tariffs, and charges of all utilities located or operating within the Reservation. It shall have the power, after notice and hearing, to originate, establish, modify, adjust, promulgate, and enforce all rates, tariffs, and charges of all utilities. Whenever the Commission, after hearing, shall find any existing rates, tariffs, charges, or schedules unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of any of the provisions of this Title, the Commission by order shall fix reasonable rates, joint rates, wheeling rates, charges, or schedules to be followed in the future in lieu of those found to be unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of any provision of law.

20-7-101 Changes in Tariff Rates; Notice to Commission. No change shall be made by any electric utility in any tariffs, rates, joint rates, wheeling rates, charges, fares, tolls, schedules, classifications or service which have been filed and published by any electric utility pursuant to this Title, except after 30 days notice to the Commission. Such notice shall state plainly the changes proposed. The Commission, for good cause shown, may allow changes upon less than the notice herein specified either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

In an April 23, 2009 letter from the Rosebud Sioux Tribe Utilities Commission office requested

from Rosebud Electric any rate increase information for the past five years. The Commission office as of this date has not received any response.

The Commission office is requesting from Rosebud Electric rate schedule or rate increase information for the past five years to be filed with the Rosebud Sioux Tribe Utilities Commission office, as required by RST Title 20 Utilities Code. Please provide the rate schedule information requested by June 12, 2009.

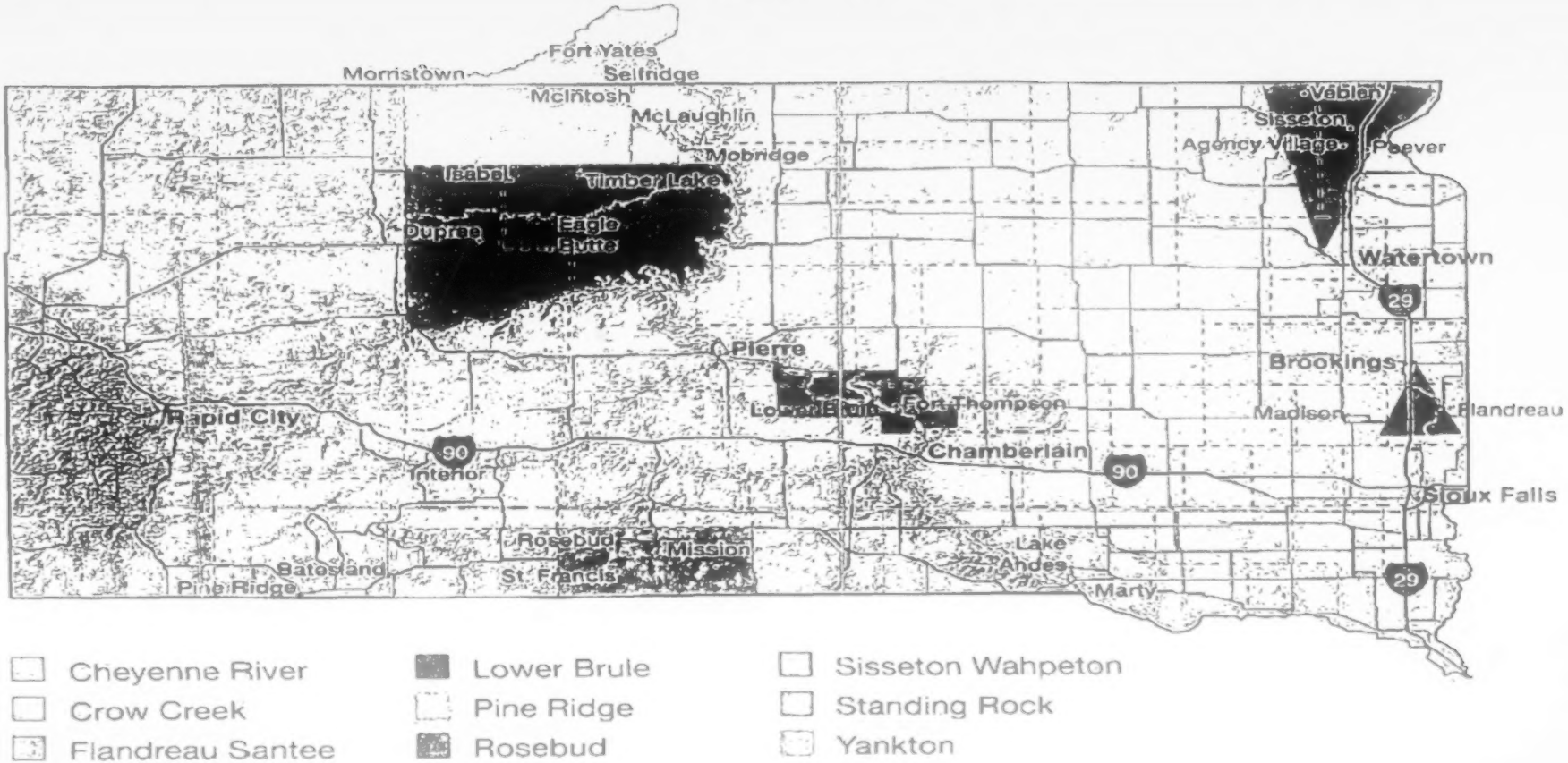
If you have any questions please feel free to call the office.

Sincerely,

/s/ Norman Running, Jr.
Norman Running, Jr.
Executive Secretary
RST Utility Commission

Cc: File

APPENDIX D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Watertown
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Pierre
Brookings
Lower Brule
Fort Thompson
Madison
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Mission
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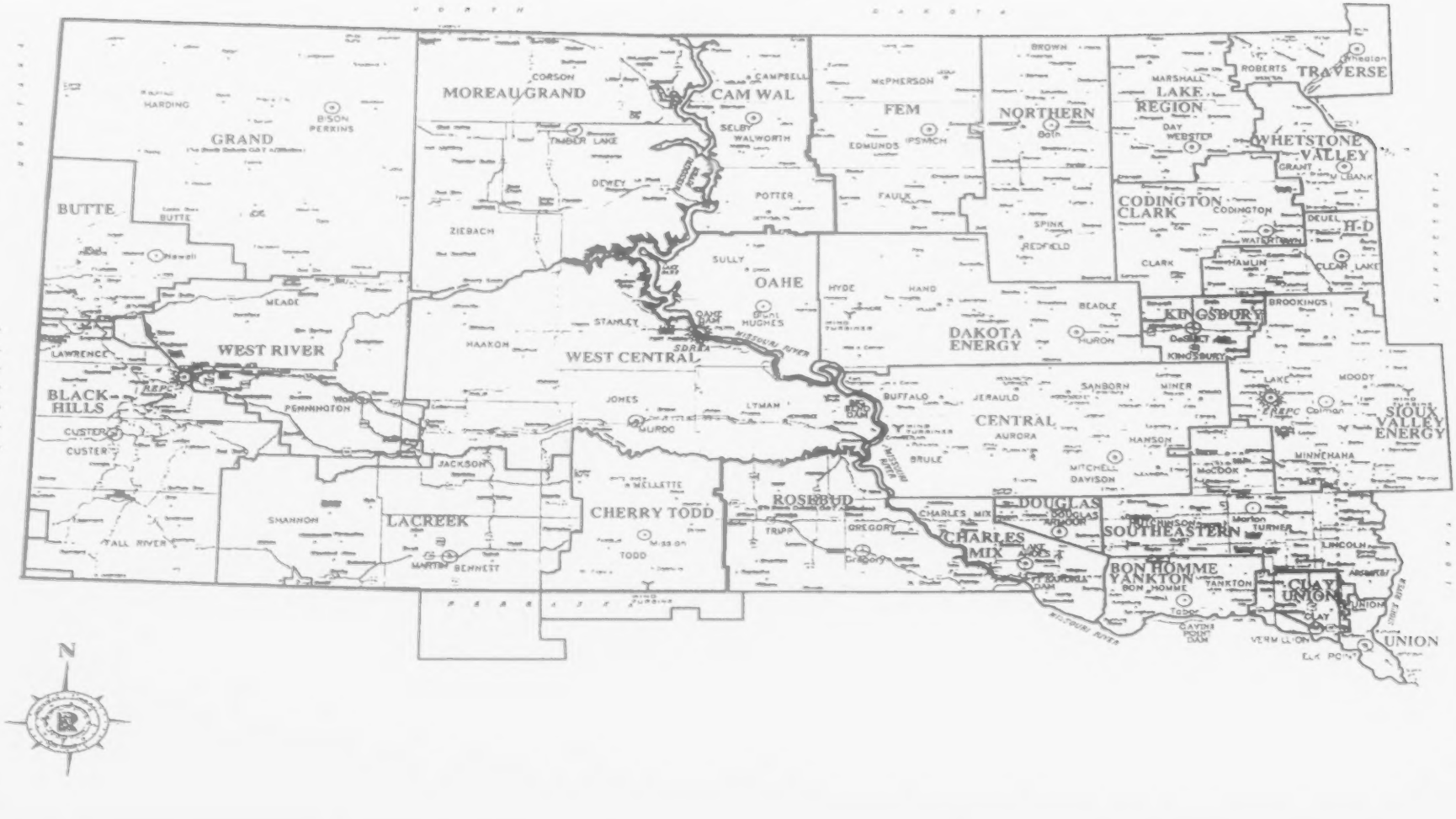
APPENDIX E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TIMBER LAKE
DEWEY
ZIEBACH
CAM WAL
CAMPBELL
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WALWORTH
POTTER
FEM
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EDMUNDS
IPSWICH
FAULK
NORTHERN
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SPINK
REDFIELD
LAKE REGION
MARSHALL
DAY
WEBSTER
ROBERTS
TRAVERSE
Wheaton
WHETSTONE VALLEY
GRANT
MILBANK
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CLEAR LAKE
HAMLIN
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SANBORN
MINER
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MITCHELL
DAVISON
BRULE
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Colman
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UNION
MISSOURI RIVER
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Nos. 10-929/10-931/10-932

Supreme Court, U.S.
FILED
FEB 22 2011
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In The
Supreme Court of the United States

DENNIS DAUGAARD,
GOVERNOR OF SOUTH DAKOTA, *et al.*,
Petitioners,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

SOUTHERN MISSOURI RECYCLING AND
WASTE MANAGEMENT DISTRICT,
Petitioner,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

PAM HEIN, STATE'S ATTORNEY OF
CHARLES MIX COUNTY, SOUTH DAKOTA, *et al.*,
Petitioners,

v

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF CITIES DANTE, GEDDES, LAKE ANDES, PICKSTOWN, PLATTE, RAVINIA AND WAGNER, *AMICI CURIAE*, IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

CRAIG M. PARKHURST
Counsel of Record
PARKHURST LAW OFFICE
PO Box 26
Armour, SD 57313
Telephone (605) 724-2410
Email cplaw@unitelsd.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICI CURIAE*[1]

Pursuant to Supreme Court Rule 37(4), the *amici* Cities of Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, respectfully submit this brief as *amici curiae,* in support of Petitioners State of South Dakota, Charles Mix County, and Southern Missouri Waste Management District. Five of the *amici* Cities, Wagner, Lake Andes, Ravinia, Dante and Pickstown, are located within the 1858 boundaries of the Yankton reservation. *Every one of these amici Cities is situated, in whole or in part, on the former allotments now held in fee, that are squarely at issue here.*[2] Two of the *amici* Cities, Geddes and Platte, lie close to the 1858 boundaries. Each of the *amici* Cities has operated, since its founding a few

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file Written consent of all parties accompanies this brief. No counsel for a party authored any part of this brief. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief Only the identified *amici curiae* made monetary contributions and funded the preparation and submission of this brief

[2] Even before the post-1948 fee lands (former allotments) were implicated, by the panel *sua sponte*, the United States told this Court that all *amici* Cities, in whole or in part, should be within the Yankton Reservation "The court of appeals erred in holding that the Yankton Sioux Reservation has been progressively diminished as formerly allotted lands have passed into non-Indian hands." Brief for the United States in Opposition at 8, *Yankton Sioux Tribe v. Gaffey* (Nos. 99-1490 and 99-1683)

years after the 1894 Yankton Act, as if no reservation boundaries exist.

The vital concern that prompts the filing of this *amici curiae* brief can be simply stated. Prior to this litigation, all the courts and parties had recognized that the 1858 Yankton reservation no longer existed. Now, a century later, a large portion of the area of Charles Mix County, South Dakota, including, in whole or in part, the *amici* Cities of Dante, Geddes, Lake Andes, Pickstown, Ravinia and Wagner, is still at issue (230,000 acres of fee lands). Consequently, a significant percentage of the approximately 6,000 people that reside in this area still face the prospect of being suddenly thrust into the status of residents of an Indian reservation.

Here, ninety percent (90%) of the land is owned by non-members and over two-thirds (2/3) of the residents are non-members who reside on small farms and in small towns and cities like Dante, Lake Andes, Pickstown, Ravinia, and Wagner. In all, there are forty-nine (49) political subdivisions within the County.

The expectations of the people in this area should not be lightly regarded or simply set aside. *Hagen v. Utah,* 510 U.S. 399, 421 (1994); *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 604-605 (1977); *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 356-357 (1998).

In fact, the first time this Court heard oral argument in this case, the Court expressly contrasted responses that minimized the significance of this case, with a picture of confusion submitted by the brief of *amici* Cities. Transcript of Oral Argument, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581), County App. II, 835.[3]

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[3] That was the first time this issue was presented to this Court Since then, although the participation of *amici* Cities in this litigation has sometimes been limited in the lower courts because of expense, *amici* Cities have always submitted arguments in this Court in support of Petitioners. *See generally* Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae,* in Support of Petitioner, State of South Dakota, on Petition for Writ of Certiorari, *South Dakota v. Yankton Sioux Tribe* (No 96-1581); Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae,* in Support of Petitioner, State of South Dakota, on Writ of Certiorari, *South Dakota v. Yankton Sioux Tribe* (No. 96-1581); Brief of the Cities Dante, Wagner, Pickstown, Ravinia, Lake Andes, Geddes, and Platte, SD, as *Amici Curiae, Yankton Sioux Tribe v. Gaffey* (No. 98-4042); Supplemental Reply Brief of Dante, Wagner, Pickstown, Ravinia, Lake Andes, Geddes, and Platte, SD, as *Amici Curiae, Yankton Sioux Tribe v. Gaffey* (No. 98-4042); Brief for Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae* in Support of Appellants, *Yankton Sioux Tribe v Gaffey* (Nos. 98-3893/3894/3896/3900SDSF); Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae,* in Support of Petitioners State of South Dakota, Charles Mix County and Southern Missouri Waste Management District, *South Dakota v. Yankton Sioux Tribe* (No. 99-1490); Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae,* in Support of Brief in Opposition of State and Local Government Parties, *Yankton Sioux Tribe v Gaffey* (No. 99-1683); Brief *Amicus Curiae* of Cities Dante,

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Unfortunately, because the crux of this Court's Opinion has been ignored in the remands, twelve years of additional litigation have compounded the confusion. The United States has consistently ignored this prudential consideration. For these reasons, the issue is still of grave importance to the residents, the *amici* Cities and the other units of local governments in Charles Mix County, South Dakota.

To the extent a picture is worth a thousand words, the confusion is best reflected by the maps originally submitted in an appendix by the State of South Dakota in conjunction with the Petition for Rehearing and Petition for Rehearing *En Banc* in the court of appeals. State Appellants' Petition for Rehearing and Petition for Rehearing *En Banc*, *Yankton Sioux Tribe v. Podhradsky* (Nos. 08-1441 and 08-1488) (Map A-Map F).

The State referenced the maps in the following sequence. 1. Historically, the area was simply recognized as a former reservation in the same manner as other areas formerly parts of Indian reservations. *See DeCoteau v. District County Court*, 420 U.S. 425 (1975); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). Map B (1994 Former Reservation Area), *amici* Cities App. 2.

Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner in Support of County and State Appellants' Petition for Rehearing and Petition for Rehearing *En Banc*, *Yankton Sioux Tribe v. Podhradsky* (Nos. 08-1441 and 08-1488).

2. In 1995, the district court determined that the 1858 Yankton Reservation remained entirely intact. *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 890 F.Supp. 878 (D.S.D. 1995). Map C (1995 District Court Decision Map), *amici* Cities App. 3.

3. In the first remand, the district court created an entirely new reservation of all the lands which had ever been in allotted status, including over 220,000 acres which had lost allotted status and which were owned by non-Indians. *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135 (D.S.D. 1998). Map D (1998 District Court Decision Map), *amici* Cities App. 4.

4. In the next remand, the district court in *Yankton Sioux Tribe v. Podhradsky*, 529 F.Supp.2d 1040 (D.S.D. 2007), found that all present day allotted land and trust land constituted "reservation" under 18 U.S.C. § 1151(a). Map E (2007 District Court Decision Map), *amici* Cities App. 5.

5. On appeal, the panel also declared, *sua sponte*, that former allotted land held in fee by nontribal members also remained "reservation" if it had lost allotted status after the effective date of 18 U.S.C. § 1151 – June 25, 1948. *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951, 967 (8th Cir. 2009). Map F (2009 Panel Decision Map), *amici* Cities App. 6.

6. As a result, some 8,000 additional acres of fee lands were declared "reservation" despite the fact that at least 7,250 acres of this land are owned by individual non-Indians and local governments. Map A

(Post-1948 Allotment to Fee Patent Map), *amici* Cities App. 1.

Moreover, compounding this confusion is the fact that this sequence of maps does not include other maps that represent additional boundary arguments submitted by the United States and/or the Tribe, but rejected in the remand process, that could also be superimposed on top of this confusion.

If that was not enough, one could also consider the additional Indian country alternative the federal district court proposed, *sua sponte,* that ultimately did not have to be decided, such as the incredible "dependent Indian community" alternative, a "community" scattered over tens of thousands of acres of noncontiguous tracts of trust land and hundreds of miles.

> To the extent any of the trust land discussed in this opinion would be found by an appellate court to not be "reservation" land, and thus not Indian country under *§ 1151(a),* the Court finds such trust land would nevertheless qualify as Indian country under *§ 1151(b),* as a dependent Indian community. . . . If any of the trust land is found by a superior court to not be "reservation" land, and thus not Indian country under *18 U.S.C. § 1151(a),* such trust land qualifies as Indian country under *18 U.S.C. § 1151(b),* as a dependent Indian community.

Yankton Sioux Tribe v. Podhradsky, 529 F.Supp.2d at 1057.

It is profoundly disturbing that reservation status is even a possibility after this Court unequivocally rejected the argument of the United States and the Yankton Sioux Tribe that would have resurrected the 1858 reservation boundaries in *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329 (1998).

The Petition for Writ of Certiorari of Charles Mix County summarizes the role that the relentless advocacy of the United States has played in this process in this case, and in other similar cases. Petition for Writ of Certiorari of Charles Mix County at 35-40. *See also* Brief of Charles Mix County, South Dakota in Support of Petitioner, *South Dakota v. Yankton Sioux Tribe* (No. 96-1581), County App. II, 460-503. This advocacy is especially noteworthy in light of the fact that on remand, the United States was granted leave to intervene as a plaintiff in this litigation. The arguments the United States submitted thereafter caused additional conflict and confusion. The relentless advocacy of the United States provides a perspective from which any submission by the United States in this case should be viewed.

In fact, in its own words, the United States openly acknowledges a "strong interest in protecting the integrity of reservation boundaries." Brief for the United States Supporting Respondents at 1, *South Dakota v. Yankton Sioux Tribe* (No. 96-1581). *Amici* Cities would submit that this Court, in deciding this case, should contrast that "strong interest" advocacy with the obligation of the United States to respect and uphold statutes enacted by the Congress of the

United States and the obligation of the United States to respect and uphold the decisions of this Court that have definitively construed those statutes. In this case, the United States has paid little attention to the role of Congress and this Court in our constitutional system. And the United States pays no attention to the fact that it is obligated to represent all citizens, whether Indians or non-Indians.

All of the above documents *amici* Cities' interest and continuing concern with this litigation, and further supports the Petition for Writ of Certiorari filed by the State of South Dakota, the Petition for Writ of Certiorari filed by Charles Mix County and the Petition for Writ of Certiorari filed by Southern Missouri Recycling and Waste Management District.[4]

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[4] Consideration of the Petitions in this case could be further influenced by an intracircuit conflict involving another case recently decided by a different panel in the Eighth Circuit. The State of South Dakota observed "the Tribe may seek certiorari in *Yankton Sioux Tribe v United States Army Corps of Engineers*, 606 F.3d 895 (8th Cir 2010), likely arguing that it is in conflict with *Podhradsky IV* on this issue." Petition for Writ of Certiorari of the State of South Dakota at 35 The County also pointed out this intracircuit conflict. "This decision of the court of appeals conflicts with allotment/fee holding in *Gaffey*, App. I, 1999, and conflicts as well with *Yankton Sioux Tribe v. United States Army Corps of Engineers*, 606 F.3d 895 (8th Cir. 2010), that expressly adopted this aspect of *Gaffey* as the holding in that case." Petition for Writ of Certiorari of Charles Mix County at 20-21 On December 17, 2010, an application was granted by Justice Alito extending the time to file a petition in *Yankton Sioux Tribe v. United States Army Corps of Engineers* (No 10A612) to February 20, 2011.

ARGUMENT

I. The decision of the South Dakota Supreme Court in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), reflects the status of this area as understood by the people that live in *amici* Cities.

James Bruguier was convicted of burglary in state circuit court. He later also pleaded guilty to being an habitual offender. Bruguier committed his crime within the 1858 boundaries of the Yankton Reservation. The crime was burglary to a residence in the unincorporated City of Pickstown, South Dakota, on formerly allotted land where Indian title had been extinguished. In a habeas corpus action, Bruguier claimed that the 1858 Yankton Reservation boundaries remained intact and, as a result, the State lacked jurisdiction. The Circuit Judge, the Honorable Kathleen Caldwell, concluded in a Memorandum Opinion and extensive Findings of Fact and Conclusions of Law that the Yankton Reservation had been disestablished. The habeas corpus petition was denied. County App. I, 396, 407.

The Supreme Court of South Dakota, following the lead of this Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), as well as its own South Dakota cases, unanimously affirmed the circuit court. In the process, the Supreme Court of South Dakota concluded, as did the circuit court, that the 1894 Act "disestablished" and "terminated" the

Yankton Reservation. *Bruguier*, County App. I, 164. *Bruguier* is in direct conflict with the decision of the court of appeals in this case, *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010).

Amici Cities anticipate the United States will find a way to argue against certiorari in this case, as the United States routinely does in every case where reservation boundaries have been resurrected (as in this case in 1998), or where reservation boundaries have been fashioned out of whole cloth (as in this case at the present time). Petition for Writ of Certiorari of Charles Mix County at 35-40. *See also* Brief of Charles Mix County, South Dakota in Support of Petitioner, *South Dakota Yankton Sioux Tribe* (No. 96-1581), County App. II, 460-503.

The last time the United States submitted a brief in this Court in this case (a brief in opposition), that brief keyed on the fact that the *Yankton Sioux Tribe* case in the Eighth Circuit was then in an "interlocutory stage." Brief for the United States in Opposition at 8, *Yankton Sioux Tribe v. Gaffey* (Nos. 99-1490 and 99-1683). According to the United States, certiorari should have been denied at that time because the Court would have a "further opportunity" to review the *Yankton Sioux Tribe* decision, together with any subsequent decisions of the court of appeals, after the proceedings on the remand were completed. *See also* the "time enough . . . to grant review at a later date" argument (*Id.* at 9, 27) and the "not ripe for this Court's review" argument (*Id.* at 21) and the "not a suitable vehicle" argument (*Id.* at 21). At the time,

the United States summarily dismissed the significance of the scope of *Bruguier*.

Now that the United States can no longer make a credible "interlocutory argument" (*Id.* at 8, 27) or a "time enough . . . to grant review at a later date" argument (*Id.* at 9, 27) or a "not ripe for this Court's review" argument (*Id.* at 21) or a "not a suitable vehicle" argument (*Id.* at 21), the *amici* Cities expect the United States to ignore most of the things that the United States told the Court in that brief in opposition regarding the "time enough for this Court to grant review at a later date" argument. We also expect the United States to denigrate the holding of *Bruguier* in a more sweeping fashion. In fact, we fully expect that the main thrust of the United States will be focused on undermining *Bruguier* in order to *obscure* the direct conflict that exists between the court of appeals in this case and the *Bruguier* decision of the Supreme Court of South Dakota.

For that reason, the *amici* Cities will review in detail the scope of the *Bruguier* litigation in the circuit court and the Supreme Court of South Dakota to remove any doubt regarding the extent of the direct conflict between the court of appeals and *Bruguier*.

A. The Memorandum Opinion and Order of the Circuit Court for the First Judicial Circuit of the State of South Dakota, County of Charles Mix, *Bruguier v. Class*, June 30, 1998, County App. I, 396-406, confirm reservation disestablishment.

The United States would be clearly wrong in claiming that *Bruguier* did not squarely hold that the Yankton Reservation has been disestablished. When *Bruguier* was presented in the circuit court, the circuit court framed the issue in that comprehensive manner:

> In order to determine whether this crime occurred on Indian country as defined in 18 USC § 1151, the Court must make *two* separate inquiries. First, the Court must determine whether land within the 1858 reservation area retains reservation status under 18 USC § 1151(a). If the Court finds this land is a reservation under 18 USC § 1151(a), there was no jurisdiction to try Bruguier in the South Dakota Courts. If, however, the Court finds this land was not a reservation under 18 USC § 1151(a), it must then determine whether the allotments in this case are Indian country under 18 USC § 1151(c).

Bruguier v. Class, County App. I, 398 (emphasis added).

The *amici* Cities think that a careful consideration of the manner in which the circuit court decided *Bruguier* will clearly undermine the "no conflict" position. We expect the United States to agree. For that reason, the *amici* Cities emphasize the way in which the circuit court carefully structured the *Bruguier* decision.

With respect to the first issue, the circuit court specifically noted that:

> The Court's first inquiry is whether this land is within the limits of an Indian reservation under 18 USC § 1151(a). The State argues in *this* case that the Yankton Sioux Reservation was *disestablished* based upon both *DeCoteau v. District County Court for the Tenth Judicial Dist.*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975) and *Yankton Sioux Tribe*. . . . In *Yankton Sioux Tribe*, the Supreme Court declined to answer whether the reservation was disestablished because it concluded it was not a *necessary* determination in resolving that case.

Id. at County App. I, 399 (emphasis added).

The analysis of the circuit court begins with a quotation from this Court in *Yankton Sioux Tribe* that recognized the presumption of disestablishment because of the operative language in the Yankton Act. *Id.* at County App. I, 400 (emphasis added).

> This "cession" and "sum certain" language is "precisely suited" to terminating reservation status. . . a "nearly conclusive," or "almost

> insurmountable," *presumption* of diminishment arises.
>
> The terms of the 1894 Act *parallel* the language that this court found *terminated* the Lake Traverse Indian Reservation in *DeCoteau*. . . .

Id. at County App. I, 400 (emphasis added).

The circuit court also rejected the argument that the saving clause precluded disestablishment. Rather, the circuit court noted that in *Yankton Sioux Tribe* this Court concluded that the clause only pertained to the continuance of annuities and not the 1858 reservation border. Accordingly, the circuit court found that the clause was not determinative on the issue of whether the reservation was disestablished. County App. I, 396-406.

The *Yankton Sioux Tribe* decision convinced the circuit court that the 1894 Act terminated the reservation. The circuit court stated that after considering the *Yankton Sioux Tribe* decision the 1894 Act:

> [E]xhibits a clear congressional intent to *terminate* the reservation. The "cession" and "sum certain" language in the Act clearly supports *termination* of the reservation under *DeCoteau*. Also, the *Yankton Sioux Tribe* Court specifically found the language in the Lake Traverse agreement involved in *DeCoteau paralleled* the language in the Yankton Sioux Agreement. 118 S.Ct. at 798.

Id. at County App. I, 402 (emphasis added).

In addition to the *Yankton Sioux Tribe* decision and the operative language in the 1894 Act, the circuit court found further support in the historical context surrounding the passage of the 1894 Act. This documentation included a Presidential Proclamation evidencing "perceived disestablishment" as well as references to the Commissioners' report of negotiations, all of which pointed to the "disestablishment of the Yankton Reservation." *Also see* the circuit court's references to the fact that the common understanding of the parties indicated the 1894 Act "terminated the reservation." County App. I, 405.

1. With specific reference to 18 U.S.C. § 1151(a), the circuit court concluded that the disestablishment found to exist was consistent with the practical realities of how land within the 1858 borders had been treated up until 1995. Citing this Court's decision in *Yankton Sioux Tribe*, as well as another South Dakota Supreme Court decision, the circuit court found that:

> it is clear from Congressional intent, the Presidential Proclamation, the Commissioners' report, the Tribal Constitution, and the later treatment of the lands within the 1858 reservation boundaries that *the reservation was terminated* by the 1894 Act. The allotted lands are *no longer a reservation* under 18 USC § 1151(a).

Id. at County App. I, 405 (emphasis added).

2. The circuit court addressed 18 U.S.C. § 1151(c) and also cited additional state cases dealing with areas, like the original Yankton area, where the original reservation boundaries were deemed to be extinguished. *See Hollow Horn Bear v. Jameson*, 95 N.W.2d 181 (S.D. 1959). The circuit court found that "an allotment to which Indian title has been extinguished . . . at the time the crime was committed . . . was no longer Indian country under 18 USC § 1151(c)." *Beardslee v. United States*, 387 F.2d 280 (8th Cir. 1967), cited in the County Petition and discussed at length in the Petition of Southern Missouri at 11, is also detailed and instructive on this point.

B. The Findings of Fact and Conclusions of Law of the Circuit Court for the First Judicial Circuit of the State of South Dakota, County of Charles Mix, *Bruguier v. Class*, August 14, 1998, County App. I, 407-430, confirm reservation disestablishment.

Subsequent to the circuit court's memorandum decision, the Petitioner in *Bruguier* moved for reconsideration and permission to supplement the record. Over the objection of the State, the circuit court allowed both parties to supplement the record and the circuit court reconsidered the case. As a result, the Findings of Fact and Conclusions of Law in the circuit court are explicit. They reference:

> relevant decision of the courts, the record in *State v. Greger*, 1997 S.D. 14, 559 N.W.2d

> 854 (which incorporates the record in the case which reached the United States Supreme Court [*Yankton Sioux Tribe*]), the affidavits, the supplemental materials referred to above, and the stipulation of the parties. The parties have stipulated, inter alia, that the burglary occurred on allotted land, the Indian title to which has been extinguished.

Findings of Fact and Conclusions of Law, *Bruguier v. Class*, Finding #9, County App. I, 409-410. As noted above, in the findings, the parties stipulated that the burglary occurred on allotted land, "the Indian title to which has been extinguished" (fee land). Findings of Fact and Conclusions of Law, *Bruguier v. Class*, Finding #9, County App. I, 410.

The circuit court set forth twenty-two pages of Findings of Fact and Conclusions of Law. As a result, the basis for the *Bruguier* opinion in the South Dakota Supreme Court was solid. It was not simply based on "reasoning" set forth in the opinion, as we expect the United States will claim. For example, Finding #17 stated:

> Prior to 1998, the Tribe has never alleged that a reservation existed which constituted all of the lands which were allotted to individual members in 1894, regardless of whether those allotments had been transferred into non-Indian hands.

Findings of Fact and Conclusions of Law, *Bruguier v. Class*, County App. I, 411. In addition, the circuit court referenced its own files in Finding #22.

> This Court also takes judicial notice of its own files and finds that this Court, which is vested with civil and criminal jurisdiction over the affected area, has not distinguished between allotted lands in non-Indian ownership and ceded lands in non-Indian ownership. All of these nontrust lands have been treated as *nonreservation* and non-"Indian country" lands within state jurisdiction as a *historical matter* up to the time of the *Yankton Sioux Tribe* case.

Findings of Fact and Conclusions of Law, *Bruguier v. Class*, County App. I, 413 (emphasis added).

Other findings confirm that same understanding with a variety of files. Finding #22A, for example, confirmed that the *only* Indian country remaining in the area, in the understanding of both the Indians and non-Indians, was allotments, the title to which had *not* been extinguished. *See* Findings of Fact and Conclusions of Law, *Bruguier v. Class*, Finding #22A, County App. I, 413-414.

In other instances, the circuit court relied upon affidavits and related materials. Even the records of the United States confirmed the conclusion of the circuit court. *See* Findings of Fact and Conclusions of Law, *Bruguier v. Class*, Finding #23G, County App. I, 417 (emphasis added), where the Acting Solicitor declared that the office had "assumed criminal jurisdiction *only* to the extent provided . . . on *unpatented* . . . " trust tracts. As the circuit court points out, the

balance of the finding confirms that the United States previously acknowledged disestablishment:

> *no reservation existed in the area* under 18 USC § 1151(a) and that the *only* "Indian country" remaining was trust allotments, the Indian title to which had not been extinguished, pursuant to 18 USC § 1151(c).

Findings of Fact and Conclusions of Law, *Bruguier v. Class*, Finding #23G, County App. I, 417 (emphasis added). Other documentation further confirmed the position reflected in the circuit court's files.

Most recently, maps circulated by representatives of the United States following the decision of this Court in *Yankton Sioux Tribe*, together with maps submitted by the state's attorney and the city attorneys, indicated to the circuit court the "absurd" jurisdictional result which would occur if the theory of the habeas Petitioner in *Bruguier* was adopted. Findings of Fact and Conclusions of Law, *Bruguier v. Class*, Finding #30, County App. I, 419-420.

The conclusions of law are explicitly tied to these findings of fact (a total of thirty-six). In conclusion, the circuit court stated:

> The Court concludes that *no lands within the area of the 1858 reservation retain "reservation" status pursuant to 18 USC § 1151(a).* The original Indian allotments which retain allotted status (in other words, those Indian allotments, the Indian titles to which have not been extinguished), retain "Indian country"

> status pursuant to 18 USC § 1151(c); the incident, however, is *not* alleged to have occurred on such lands.

Findings of Fact and Conclusions of Law, *Bruguier v. Class*, Conclusion #24, County App. I, 429-430 (emphasis added).

C. *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), County App. I, 164-198, confirms reservation disestablishment.

The South Dakota Supreme Court in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), County App. I, 164-198, was fortunate to have the extensive record and comprehensive Memorandum Opinion and Findings of Fact and Conclusions of Law of the circuit court.

The South Dakota Supreme Court first noted the holding of the circuit court that "the reservation had been 'disestablished' and that no lands within the former 1858 boundaries now constitute a reservation under 18 USC § 1151." *Id.* at County App. I, 166. And then the South Dakota Supreme Court expressly contrasted that holding with the position of the federal district court:

> On the same day the circuit court signed the findings, *the U.S. District Court ruled that the 1858 boundaries remain intact* . . . 14 F.Supp.2d 1135 (D.S.D. 1998).

Id. (emphasis added).

In this remarkable ruling of the federal district court, which the United States later neglected to bring to the attention of this Court, even after the federal district court was reversed in *Gaffey*, which the United States also neglected to bring to the attention of this Court, the federal district court simply ignored this aspect of the decision of this Court in *Yankton Sioux Tribe* and the express language set forth in the text of the Opinion. This Court made clear that the 1858 reservation boundaries of the Yankton Reservation were not maintained. "The 1894 Act is also readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries. . . . The Tribe asserts that because that clause purported to conserve the provisions of the 1858 Treaty, the existing reservation boundaries were maintained. . . . [W]e conclude that the saving clause pertains to the continuance of annuities not the 1858 borders." *Yankton Sioux Tribe*, 522 U.S. 329, County App. I, 344-345, 347 (emphasis added).

With the benefit of the decision in *Yankton Sioux Tribe*, the South Dakota Supreme Court clearly understood the issue.

> More precisely, the question is whether parcels originally allotted to individual Yanktons compose part of a permanent reservation under 18 USC § 1151(a), or whether only those allotments still held in Indian hands are Indian country under 18 USC § 1151(c). . . . In *Yankton Sioux Tribe* . . .

> [t]he Court limited its holding . . . Left undecided was whether there now exists any reservation boundary, and if so, where it lies. We conclude, the boundaries created in the 1858 Treaty no longer exist because no provision was made in the 1894 Act to delineate any boundary . . . the Supreme Court . . . found that the 1894 Act is 'readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries.'

Id. at County App. I, 177-180.

The Supreme Court of South Dakota also referenced the briefs in the Joint Appendix from "*Yankton Sioux Tribe, et al. v. Gaffey, et al.* (8th Cir. 1999)," in addition to the record in *Yankton Sioux Tribe. Id.* at County App. I, 166. Then, the South Dakota Supreme Court also recognized the importance of the General Allotment Act. County App. I, 167, 182.

The Supreme Court of South Dakota respected the general principles set forth in *Yankton Sioux Tribe*. The Court stressed the importance of *DeCoteau* in *Yankton Sioux Tribe. Id.* at County App. I, 181, 195-196. The presumption of disestablishment was attributed to the language of the Yankton Act as set forth in detail at County App. I, 181. The Court found:

> Noteworthy in the 1894 Act is the absence of any provision for tribal ownership. No land was reserved even for tribal purposes. It was decades after the reservation was opened

> that the Tribe acquired land from the Government that the United States no longer needed. Act of February 13, 1929, Pub. L. No. 70-729, 45 Stat. 1167 (returning to Tribe 1000 acres titled in United States that had been [ceded to the United States but] reserved in the 1894 Act. . . .

Id. at County App. I, 185.

The fact that no land was reserved even for tribal purposes was contested by the United States and the Tribe in oral argument in *Yankton Sioux Tribe* (unresolved at that time and "crucial" according to at least one member of the Court). Transcript of Oral Argument, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581), County App. II, 845.[5] (In the remand, the fact that no land was reserved even for tribal purposes was not challenged by the United States or the Tribe, as documented in the opinion of the federal courts.)

Importantly, the Court recognized that after the cession "tribal title" did not involve allotments, as Felix Cohen explained in the initial Federal Indian Law text. *Id.* at County App. I, 183. As Charles Mix County has pointed out, the United States and tribal

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[5] In one exchange, Justice Scalia tried to get to the crux of the issue County App. II, 844-845. But the Yankton Sioux Tribe and the United States did not come forth with the correct answer to the question (no lands in common, as Justice Scalia suspected). As a result, *Yankton Sioux Tribe* did not definitively resolve the status of the Yankton Reservation

advocates ordinarily cite later tribal advocacy editions of this Cohen text, but at this stage in the *Yankton Sioux Tribe* proceedings, such references are "remarkably absent." Petition for Writ of Certiorari of Charles Mix County at 32. Moreover, the *amici* Cities agree with the County that Federal Indian Law texts undermine the position of the United States and the Yankton Sioux Tribe in this case, as well as the opinions on the remands.

Under the subheadings of "Historical Context" and "Regulated Developments in the Area," *Bruguier* discussed the history of the 1894 Act and every significant argument that had been advanced in opposition to reservation disestablishment since *Yankton Sioux Tribe*. The Court concluded the discussion in no uncertain terms.

> In *Greger*, we refrained from interpreting the 1894 Act any broader than necessary. The Supreme Court in *Yankton Sioux Tribe* likewise decided only that the ceded portion of the reservation was diminished. *Today we proceed further . . . We conclude that Pickstown is not Indian country under 18 USC § 1151. It is not situated within the boundaries of a reservation because the Yankton Sioux Reservation was effectively terminated by the 1894 Act.* Nor is it trust land, a dependent Indian community, or property held by the Tribe.

Id. at County App. I, 197 (emphasis added).

In conclusion, we agree with the County that had the comprehensive opinion in *Bruguier* been decided at the time this Court decided *Yankton Sioux Tribe*, the twelve years of remand litigation, instituted by the United States and the Yankton Sioux Tribe since that time, would have been unnecessary and could not have been maintained.

Moreover, *amici* Cities also agree with the State and the County that some type of summary disposition in this case may be appropriate. Petition for Writ of Certiorari of the State of South Dakota at 38, n.9. Petition for Writ of Certiorari of Charles Mix County at 8, n.2. In *Yankton Sioux Tribe*, this Court provided the lower courts with an opportunity to clean up a result that should never have been adopted in the first place. The district court and the court of appeals did not appreciate that opportunity and continued to go down the wrong path, essentially ignoring the direction of this Court in *Yankton Sioux Tribe*. In *Bruguier*, the Supreme Court of South Dakota meticulously adhered to the teachings of this Court in *Yankton Sioux Tribe* in every respect. For that reason, summary consideration in conformity with *Bruguier* seems particularly appropriate at this time.

CONCLUSION

For the foregoing reasons, and those stated in the Petitions of the State of South Dakota, Charles Mix County and Southern Missouri Recycling and Waste

Management District, the Petitions for Writ of Certiorari should be granted.

Dated this 22nd day of February, 2011.

Respectfully submitted,

CRAIG M. PARKHURST
Counsel of Record
PARKHURST LAW OFFICE
P.O. Box 26
Armour, SD 57313
Telephone: (605) 724-2410
Email: cplaw@unitelsd.com

City Limits

Patents Post June 1948

10/30/2009 nms Charles Mix County
GIS Administrator

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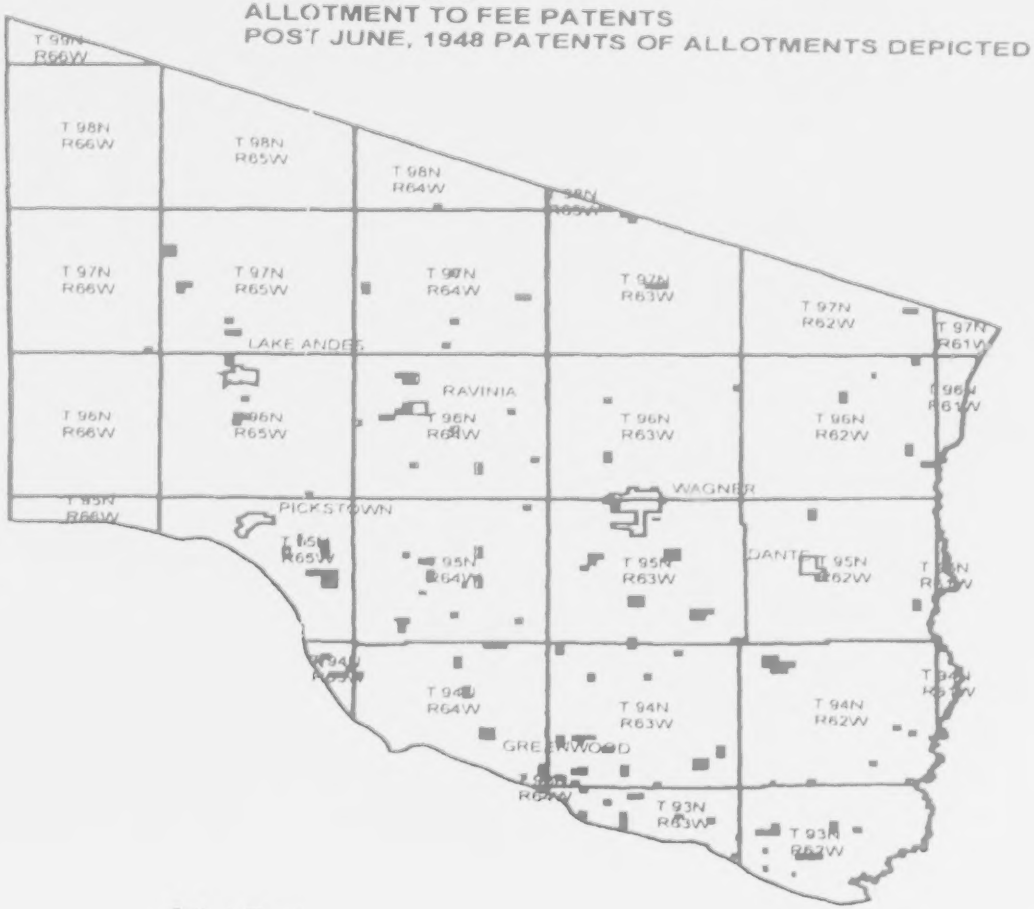
CHARLES MIX COUNTY, SOUTH DAKOTA
POST JUNE 1948
ALLOTMENT TO FEE PATENTS
POST JUNE, 1948 PATENTS OF ALLOTMENTS DEPICTED IN RED



MAP A

City Limits
Townships

10/30/2009 nms Charles Mix County
GIS Administrator

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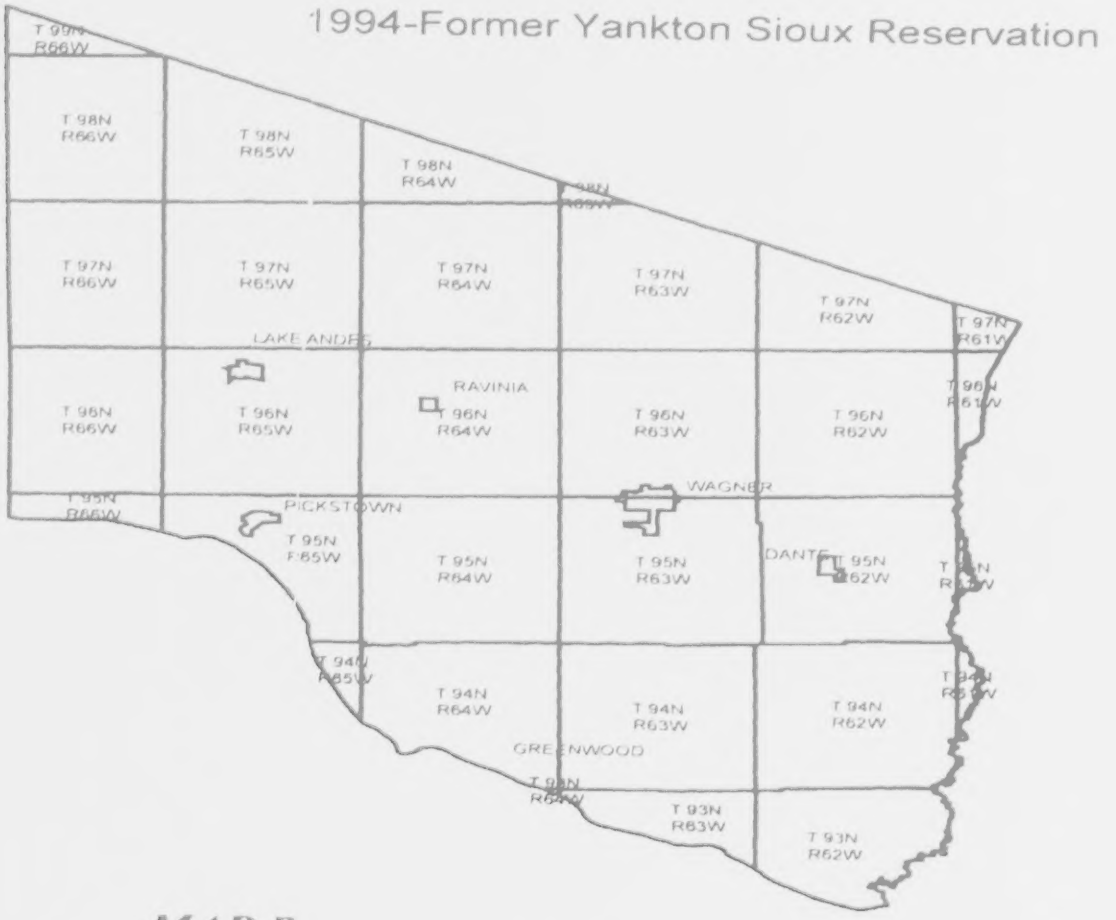

MAP B

Townships

10/30/2009 nms Charles Mix County
GIS Administrator

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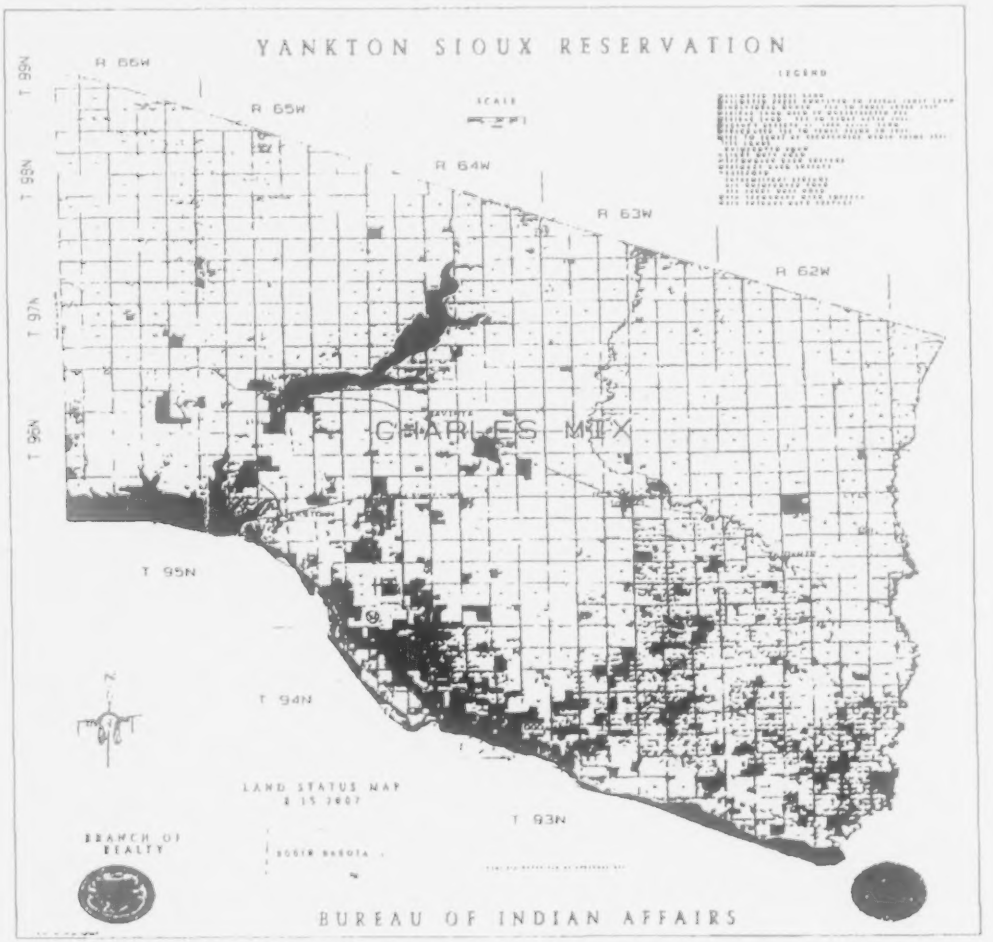
1995 District Court Decision
Yankton Sioux Reservation
("Reservation" lands depicted in red)

MAP C

MAP D

1998 District Court Decision Map
("Reservation" includes all areas in red)
Source: Brief of Appellant Yankton Sioux Tribe
in Yankton Sioux Tribe v. Corps of Engineers,
No. 08-2252 (8th Cir.), at Add. 69.

2007 District Court Decision Map
("Reservation" includes all darker
squares, except for the blue-grey squares)
Source: Ex. 209 in Yankton Sioux Tribe
v. Podhradsky, Civ. 98-4042



MAP E

2009 Panel Decision
Yankton Sioux Reservation
("Reservation" includes
bright red squares,
and all darker squares,
except those in blue-grey.)

Source: Ex. 209 in Yankton Sioux
Tribe v. Podhradsky, Civ. 98-4042,
plus the post June 25, 1948
See patents as they are also shown on Map A.
See County description below

City Limits
Patents Post June 1948

10/30/2009 nms Charles Mix County
GIS Administrator

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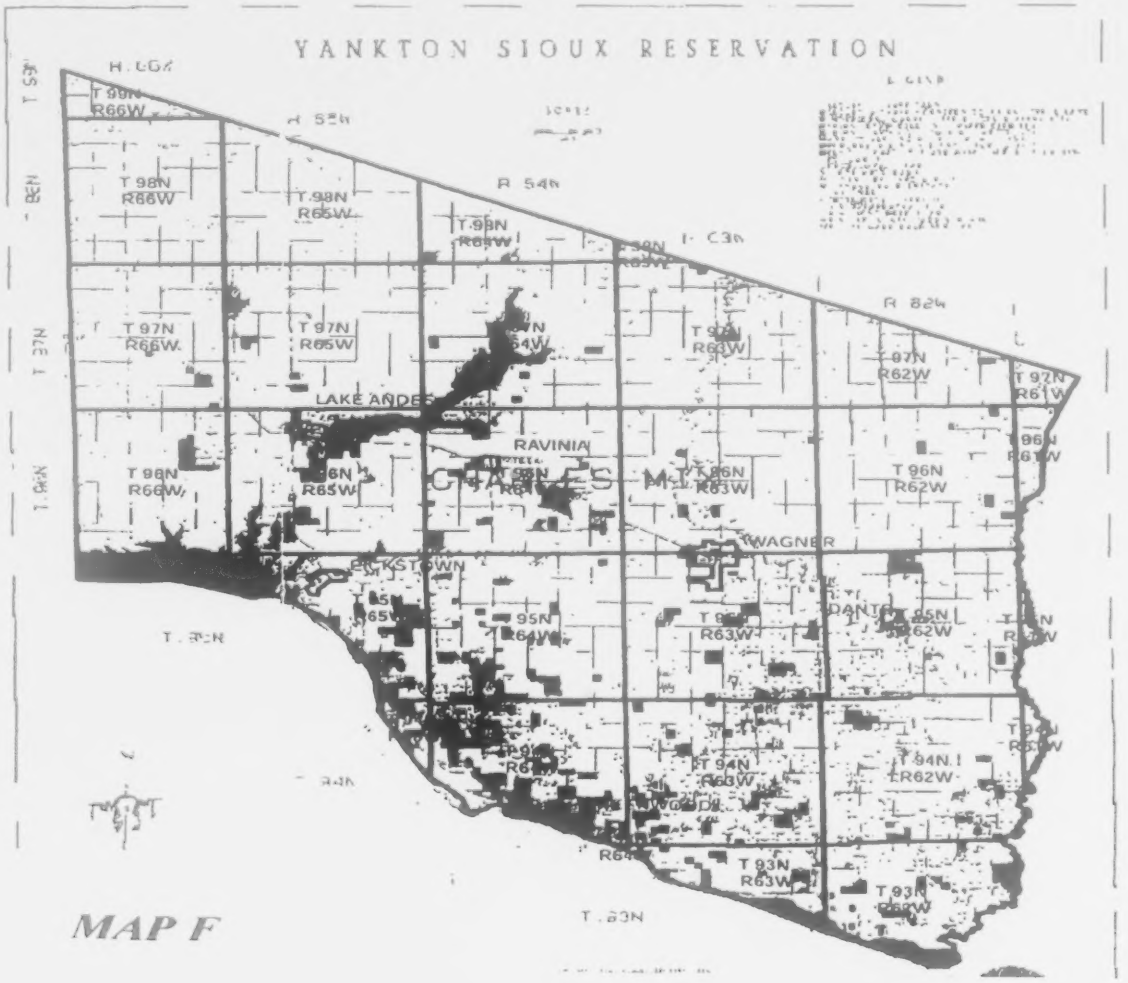

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Nos. 10-929/10-931/10-932

Supreme Court, U.S.
FILED
FEB 21 2011
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DENNIS DAUGAARD, Governor of South Dakota, et al.,
Petitioners,

v.

YANKTON SIOUX TRIBE, et al.,
Respondents.

SOUTHERN MISSOURI RECYCLING AND WASTE MANAGEMENT DISTRICT,
Petitioner,

v.

YANKTON SIOUX TRIBE, et al.,
Respondents.

PAM HEIN, State's Attorney of Charles Mix County, South Dakota, et al.,
Petitioners,

v.

YANKTON SIOUX TRIBE, et al.,
Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

AMICUS CURIAE BRIEF FOR COLIN SOUKUP, REPRESENTING THE FRANK SOUKUP FAMILY LIMITED PARTNERSHIP, AND DAN CIMPL IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

TIMOTHY R. WHALEN
WHALEN LAW OFFICE, P.C
P.O. Box 127
Lake Andes, SD 57356
Telephone: 605-487-7645
E-mail: whalawtim@cme.coop
Attorney for Amicus Curiae Colin Soukup, representing the Frank Soukup Family Limited Partnership, and Dan Cimpl

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
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INTERESTS OF *AMICI* LANDOWNERS[1]

The representative landowners in this matter are Colin Soukup, representing the Frank Soukup Family Limited Partnership, and Dan Cimpl. The original *amici* landowners in the trial court and United States Eighth Circuit Court of Appeals were Leonard Kreeger, Colin Soukup, representing the Frank Soukup Family Limited Partnership, Mark Van Duysen and Dan Cimpl; however, two of the original *amici* landowners requested that their name be removed from this brief due to hostile actions attributable to the Bureau of Indian Affairs (BIA) and the Yankton Sioux Tribe (YST).

A. Hostilities of the USA/YST toward the landowners.

There have been arguments asserted in the lower Courts by the USA and the YST that *Podhradsky* will not change the relationship between the Indian and non-Indian citizens of Charles Mix County. *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010). This is not true. A prime example of the YST and BIA hostility is as follows:

---

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. Written consent of all parties accompanies this brief. No counsel for a party authored any part of this brief. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Only the identified *amici curiae* made monetary contributions and funded the preparation and submission of this brief.

The representative landowners on the three most recent *amicus curiae* briefs filed in the lower court were Leonard Kreeger, Colin Soukup, Representing the Frank Soukup Family Limited Partnership, Mark Van Duysen and Dan Cimpl. All of the initial representative landowners or their immediate family members leased land from the YST and had done so for numerous years. One landowner and his family had leased land from the YST for approximately 70 years. Generally, the BIA engages in a process for the lease of the YST land whereby the current tenant of the land executes a document entitled "Allotted Land Request For Negotiated Lease" (Request) and sets forth on the Request the amount of rent he is willing to pay for the property. The YST either accepts or rejects the Request. If the Request is accepted, it is then signed by the YST, the BIA and the landowner. After the Request is signed, a lease is then required to be signed by the YST and the landowner and thereafter approved by the BIA Superintendent. This process was followed with regard to YST property leased by the representative landowners, as well as other affected landowners for numerous years. In accordance with the above process, each of the landowners had submitted a Request and the YST and BIA had approved same. In certain instances, the landowner and the YST had already signed the leases, but approval from the BIA was pending.

This process had occurred several weeks before the *amicus curiae* briefs were to be filed in the Eighth Circuit. After the filing of the final *amicus curiae*

brief in the Eighth Circuit, the leases for the YST land that had been awarded to certain landowners who participated in or supported the *amicus curiae* efforts were revoked by the BIA Superintendent, Ben Kitto. When Mr. Kitto was approached by certain landowners regarding a reason for the delay in the issuance of their leases, Mr. Kitto advised that their leases would not be forthcoming for the sole reason that the representative landowners filed briefs in support of the State of South Dakota and Charles Mix County in this litigation. As a result of the revocation of their leases, the YST property was to be offered for bid in a competitive bidding process. The landowners were further advised by Mr. Kitto that, even if they submitted the high bid under the new bidding process, because of their participation in the litigation, they would not be awarded the lease for the YST property.

It was made abundantly clear to the representative landowners that unless they stopped supporting the State of South Dakota and Charles Mix County in this litigation, the YST and the BIA would impose financial punishment upon them in perpetuity. Given the sovereign immunity of the YST, the landowners were left without a legal remedy and without an opportunity to redress the patently wrongful and malicious conduct of the YST and the BIA. The vindictive conduct of the YST and the BIA was not limited to landowners who participated in the litigation, but also extended to those landowners who the YST and BIA discovered had contributed financial support to the representative landowners in this litigation.

The above conduct was brought to the attention of Ken Salazar, Secretary of the Interior; however, no response nor remedial action was taken by the USA, the BIA or the YST. Consequently, the representative landowners on this brief have been reduced to two since the financial consequences suffered by the other *amici* landowners was so severe that it caused them to withdraw their names from this brief.

Other relationships with Indian individuals and the YST previously enjoyed by the landowners personally or through their businesses have been damaged if not completely destroyed. The net effect of this litigation and the fallout associated therewith is that it has created hostility, anger and vindictiveness because of the legal maneuvering by the USA and the YST and the failure on the part of the Courts to resolve in a conclusive manner the issues herein. *See*, State of South Dakota's Petition for Writ of Certiorari, at 35-40. A resolution must be reached or the tension and angst associated with this case will continue.

The landowners submitting this brief represent not only themselves, but also numerous other landowners who are similarly situated.

B. Historical aspects of landowners' interests.

In *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. Aug. 25, 2009) the United States Court of Appeals for the Eighth Circuit held, among other things, that all lands acquired by non-Indians from

Indian persons subsequent to the enactment of 18 U.S.C. § 1151 on June 25, 1948, were reservation lands under § 1151(a). This decision also created mini reservations under § 1151(a) by placing boundaries around certain trust lands located within Charles Mix County.

The Eighth Circuit amended its opinion in the *Podhradsky* case pursuant to an Order on Petitions for Rehearing which was entered by the Court after petitions for rehearing and review of the original opinion had been filed by the State of South Dakota and Charles Mix County. *See*, State of South Dakota's Petition for Writ of Certiorari, App. 1 and 52. The main modification to the original *Podhradsky* opinion was to remove footnote number 10. *See*, *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010). It seemed apparent from the Order on Petitions for Rehearing that the Eighth Circuit intended to down play the impact regarding the status of lands acquired by non-Indians after June 25, 1948. Although the amended opinion removed footnote 10, the operative language within the original opinion remained and the concerns of the various landowners regarding the status of their lands has not changed. Moreover, the language in the amended opinion clearly provides the rationale for the declaration of the post-1948 fee lands as reservations.

All of the landowners have an interest in lands that were acquired by them or their grantors after the enactment of 18 U.S.C. § 1151 on June 25, 1948. Most of the landowners affected by the amended

Podhradsky decision engage in farming or ranching or other agricultural related businesses on their property. Certain landowners have passed their ownership interests to their family members over the years with the hope to see their family farms continue to exist in the same fashion as their ancestors. Other landowners have commercial businesses on affected property or have housing interests thereon. The decision rendered in the amended opinion in *Podhradsky* adversely impacts the rights and privileges of the parties as well as the citizens, cities, governmental subdivisions, and entities in Charles Mix County, but it has a particularly severe impact on the landowners. The impact on the landowners is to such an extent that they believe that their interests must be considered by the United States Supreme Court as it determines whether or not to grant the Petitions for Writ of Certiorari filed by the State of South Dakota, Charles Mix County and Southern Missouri Recycling and Waste Management District.

In addition to the above, the *Podhradsky* decision has a discriminatory effect on the landowners in at least two significant ways. First, many of the landowners receive utility services in Charles Mix County from Charles Mix Electric Association, Inc. (CME), a rural electric cooperative, and Randall Community Water District (RCWD), a political subdivision of the State of South Dakota. The decision impacts these local utility companies since under the current federal regulatory scheme and federal case law, civil and regulatory jurisdiction of an Indian Tribe is directly

linked to the status of the land. If the land is determined to be Indian Country under 18 U.S.C. § 1151(a) due to its reservation status, then the YST will assert civil and regulatory authority over entities who are present on or engage in business on the § 1151(a) reservation land. *See*, *Montana v. United States*, 450 U.S. 544 (1981); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc. et al.*, 554 U.S. 316 (2008). CME and RCWD provide utility services to the affected landowners, as well as Indians and non-Indians who reside on and off the newly created § 1151(a) reservation lands. Since the YST asserts regulatory authority over the above entities on § 1151(a) reservation lands, it may claim a right to regulate the utility rates, enforcement procedures, and other aspects of the utility providers' services to Indian persons on said reservation lands. Moreover, given the status of the governing case law, the YST can disregard the in-house rules, by-laws and regulations of CME and RCWD and, to a certain degree, the federal regulations that govern the above entities. *See*, *Plains Commerce Bank*, 554 U.S. at 329-330. The net effect is that the landowners and other non-Indian customers will be treated differently than Indian customers who receive the same utility services from the above entities and thereby suffer a discriminatory effect from the impact of the *Podhradsky* decision.

Secondly, many of the *amici* landowners reside in the Wagner School District and send their children to

the Wagner public schools. The *Podhradsky* decision impacts the Wagner School District due to the fact that the school is situated on property acquired after 1948. Since the Wagner School system is now on YST reservation land, Indian students will be subject to the jurisdiction of the YST and its tribal courts with regard to certain matters that occur in school. Consequently, the YST arguably will be able to impose upon the Wagner School system its requirements for student discipline and other matters associated with the operation of the school.

In addition, the creation of reservations on the post-1948 fee lands under the *Podhradsky* decision will subject the landowners to civil and criminal jurisdiction by the YST which did not exist before.[2] Further, as a result of *Podhradsky* and the attitude adopted by the YST and the BIA, many of the landowners have suffered financially.

Finally, the Court's amended decision in *Podhradsky* leaves a clear conflict with the decisions rendered by this Court and the South Dakota Supreme Court and begs for a resolution of the issue left undecided in the *Yankton* case. *See, South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). Consequently, it is important that this Court resolve not

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[2] After the 1995 decision by the District Court and the decision by the Eighth Circuit, jurisdiction was changed for a period of time until these decisions were reversed by the United States Supreme Court in the *Yankton* case.

only the injustice suffered by the landowners, but also the conflicts with the *Podhradsky* decision due to the Eighth Circuit's refusal to adhere to the doctrine of *stare decisis*.

ARGUMENT

A. Impact upon the landowners.

The landowners in the area affected by the *Podhradsky* decision have been devastated, once again, by an unfair, unprecedented, and unjust decision by the Eighth Circuit.

1. Justifiable expectations of the landowners.

In Indian jurisdiction cases, courts are required to consider in depth the justifiable expectations of the people impacted by the court's decision and these expectations should not be ignored or simply swept aside. *See*, *Hagen v. Utah*, 510 U.S. 399, 421 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605 (1977). The Eighth Circuit's Order on Petitions for Rehearing indicated, in part, that the basis for the modification of the original *Podhradsky* decision regarding the lands acquired after June 25, 1948, was to give due regard to the justifiable expectations of the people impacted by the Court's original decision. The amended opinion, however, fell far short of accomplishing this goal and the justifiable expectations

of the landowners was clearly ignored and swept aside.

Moreover, the historical aspect of the area subject to the litigation in *Podhradsky* was largely ignored by the Eighth Circuit in favor of a decision that adversely impacted the landowners. The South Dakota Supreme Court, following the lead from this Court in *Yankton*, recognized that a court cannot

> . . . ignore the palpable reality that, as the years passed after the 1895 opening, no one behaved as if the reservation remained in existence, not the Federal Government, not the Yankton Sioux, not the State, not the homesteaders, not the townspeople. However carefully we may pore over the thousands of words in treaty negotiations, in chronicles, in agency reports, in statutes, in latter day scholarly exegesis, we cannot ignore the historical actuality of what happened following the opening. The area was utterly transformed. . . . Following a recurrent theme, first came the settlers, then the railroads, then the towns, and businesses. This precipitous change in regional character is undeniable. If not dispositive of the question, it certainly has a persuasive bearing on our decision. . . . With the opening of the reservation came law and order administered by the State, with few exceptions. . . . No distinction was made between ceded lands and allotted lands that passed out of Indian hands. The "single most salient fact [relating to later jurisdictional history] is the unquestioned

> actual assumption of state jurisdiction. . . ." . . . In Yankton Sioux Tribe, the Supreme Court considered this factor influential: "The State's assumption of jurisdiction over the territory, almost immediately after the 1894 Act and continuing unchallenged to the present day, further reinforces our holding." . . .

Bruguier v. Class, 599 N.W.2d 364, 375-376 (1999), citing *Yankton*, 522 U.S. at 356-357, and *Rosebud Sioux Tribe*, 430 U.S. at 603. Clearly, the justifiable expectations and the understanding of the parties who resided in the area subject to reservation litigation is critical to a fair and just decision by any appellate court.

In addition, the amended opinion left the impact of the original opinion virtually unchanged as it relates to the affected landowners because the operative language relative to the issue affecting the landowners remained in the amended opinion. Consequently, it is important that this Court remedy the shortfall of the Eighth Circuit and give due consideration, regard and weight to the position of the landowners affected by the amended *Podhradsky* decision.

2. Effects of the litigation on the landowners.

The status of certain lands in Charles Mix County have been the subject of litigation for numerous years, but the most intense and, perhaps, the most damaging litigation has been during the past 15 years. The intense litigation began in 1994 when the

YST sued Southern Missouri Waste Management District. *See*, *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 890 F.Supp. 878 (D.S.D. 1995). The trial court and the Eighth Circuit resurrected the old 1858 reservation boundaries, and changed over 100 years of the understanding and expectations of the citizens in Charles Mix County. These decisions, however, were reversed by the United States Supreme Court in a unanimous decision in the *Yankton* case. The *Yankton* case appeared to resolve the disputes which involved the landowners' property and placed them back in the status quo with regard to their landowner rights and privileges under the law.

At the trial in this case, the landowners appeared to be, once again, in the sights of the YST and the USA with regard to certain claims and arguments.[3] The arguments advanced by the USA and YST at trial were clearly contrary to the governing law, but, nonetheless, placed the landowners in a precarious situation with regard to their property rights and privileges as protected by and afforded to them under the United States and South Dakota Constitutions.

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[3] At the second trial YST and the USA argued, among other claims, that 25 U.S.C. § 398d (1927 Act) and/or the Indian Reorganization Act of 1934, 25 U.S.C. §§ 2 and 4 (1934 Act) froze the reservation boundaries. The YST and the USA argued that as a consequence of the 1927 and 1934 Acts certain lands must be considered to remain within the boundaries of the Yankton Sioux Reservation. Even the Trial Court and Eighth Circuit rejected these arguments

If these arguments were to prevail, many of the landowners' rights and privileges associated with their lands would be destroyed. At trial, no evidence was presented, nor any claims or arguments made by any parties, that lands acquired by non-Indian persons from Indian persons after June 25, 1948, should be granted reservation status.

The trial court decision did not mention, nor did it attach any significance to the June 25, 1948, date with regard to the creation of reservation lands. Consequently, the landowners' rights and privileges appeared to remain intact, as contemplated by the *Yankton* decision and the long line of decisions prior thereto from this Court and the South Dakota Supreme Court.

The landowners' enjoyment of their rights and privileges, however, was short lived. The Eighth Circuit heard and considered arguments, but none of the arguments asserted by the parties attached any significance to land acquisitions in relation to the date of the enactment of 18 U.S.C. § 1151. In spite of the lack of a factual record and legal arguments, a decision was rendered which was unsupported from a factual and legal standpoint. The *Podhradsky* decision is particularly unsettling in light of the unprecedented significance attached to the differentiation of the rights of landowners by virtue of the date of the acquisition of their property. The *Podhradsky* decision placed reservation boundaries around fee land owned by non-Indian persons simply based upon the time in which the land was acquired. Moreover, the decision

created mini reservations throughout Charles Mix County and thereby created an impossible situation for the businesses and landowners in the affected area.

Since *Yankton*, the landowners have been required to endure repeated legal assaults by the YST and the USA on their rights and efforts to enjoy their property in peace and tranquility. While the *Yankton* decision appeared to resolve the differences of the citizens in Charles Mix County, repeated efforts by the YST and the USA and the strained rationale of the Eighth Circuit in *Podhradsky* and other Indian law cases, have kept the litigation alive and thriving to this date. *See*, State of South Dakota's Petition for Writ of Certiorari, Statement of the Case, at 5-16; and Charles Mix County's Petition for Writ of Certiorari, Statement of the Case, at 10-16. Moreover, if the rationale of the amended opinion in *Podhradsky* is left to stand, many of the landowners' rights and privileges associated with their property will be destroyed.

3. Adverse alteration of the status quo.

The adverse alteration of the status quo and the rights of the landowners in the affected area of Charles Mix County are exemplified by the following:

a) Landowner rights.

A landowner's safe harbor for himself and his family is his home and, in rural America, his land.

This means that one can always take solace in the fact that when he is on his property, his rights are paramount and protected by the United States Constitution, the South Dakota Constitution and the body of laws enacted pursuant thereto. Ownership and possession of the land governs and dictates the rights one has related thereto and the fashion in which his rights may be asserted and protected. Part of these rights include the right to exclude whomever a landowner desires from his property. This would no longer be the case with regard to the affected landowners if *Podhradsky* is not reversed. *Podhradsky* places reservation boundaries around fee lands that are owned by non-Indian persons and arguably subjects them to laws and regulations by a sovereign nation that is foreign to them and which has no ownership interest in their lands. Moreover, the landowners would be subject to a tribal government in which they are prohibited from voting or otherwise voicing their opinions on other governing matters. Unlike laws that are enacted by the USA or South Dakota, the landowners have no right to be involved in the process of enacting the very laws, rules and regulations that will directly affect their lives, nor will they have the right to be involved in the enforcement process associated with said laws.

As an example of the absurd situation created by the *Podhradsky* decision, one merely needs to examine something as common as zoning. Charles Mix County does not have a zoning ordinance and a landowner can construct a livestock confinement unit

(LCU) on his property so long as he complies with South Dakota law. This is not the case with the affected landowners here. If the affected landowners desire to construct an LCU on their property, which is now a reservation, they must arguably comply with any zoning ordinance enacted by the YST. Further, they must arguably comply with the YST's Tribal Employment Rights Ordinance (TERO) and its ordinances governing the operation of a business on reservation lands. This means that not only will the affected landowner be required to pay a TERO tax on his operations, but he will be required to purchase a business permit or license from the YST. Moreover, given the attitude and actions of the BIA and the YST since *Podhradsky* as discussed herein, it is entirely likely that the YST will treat the landowners on the affected property differently and more harshly than an Indian person who is similarly situated. The harsh reality of the *Podhradsky* decision is that it will be used to permit the YST to control the use, ownership and occupation of land when it does not own the land, does not have any trust or leasehold interest in same, and has not contributed to the acquisition or maintenance of the land in any regard. This is absurd, an abomination, and most definitely contrary to generally accepted property law concepts.

In addition, many of the affected landowners currently engage in business on their property. In light of *Podhradsky*, the YST arguably will be in the position to require the affected landowners to either pay a TERO tax or secure a business permit or license to

continue to engage their businesses on their own property even if they do not modify or expand their operations in any regard. Moreover, the landowners could be subjected to taxation and fees to be imposed by the YST and they have no right to challenge or contest the assessment of these taxes and fees in any court of competent jurisdiction.

b) Criminal jurisdiction.

Criminal jurisdiction on the affected land will change dramatically under *Podhradsky*. After the District Court recognized the 1858 boundaries of the YST Indian reservation in 1995, local law enforcement officials met with tribal and federal officials to discuss jurisdictional issues and the logistics associated therewith. At this meeting, an Assistant U.S. Attorney made the comment that jurisdiction is not subject to debate, the agreement of the parties, or other principles, as a governmental entity either has jurisdiction or it does not. This is true. *Podhradsky* gives to the YST criminal jurisdiction over the affected lands – period. No amount of discussion or legal manipulation can change this. Consequently, if a crime is committed on the post-1948 reservation lands, the landowner will no longer call the Charles Mix County Sheriff to respond to crimes, but will be required to call BIA or YST officers. Moreover, while the race of the perpetrator or victim can affect criminal jurisdiction on reservation lands, the initial response will be by BIA or YST officers since there is no cross deputization in Charles Mix County and

these are reservation lands under *Podhradsky*. An additional problem that surfaces with the post-1948 reservation lands is that very little of the land is contiguous. Consequently, the BIA and YST officers will be required to travel long distances to cover their new jurisdiction. As a practical matter, this renders law enforcement a virtual nullity.

Further, the exact lands which are part of the post-1948 reservation are virtually unknown to law enforcement officers. Consequently, officers will be hampered by making decisions as to the status of the lands from which the emergency call originated prior to responding to the calls. This delay will allow perpetrators to continue their crimes or avoid apprehension. Protection from criminal activity and the punishment for the convicted criminal under *Podhradsky* will be chaotic at best. Furthermore, the hostility between the BIA and YST and the landowners, as discussed herein, will certainly affect the inclination to provide adequate and efficient law enforcement services to the affected lands. This problem was addressed in the *Yankton* case and was part of the basis for the unanimous decision to overrule the Eighth Circuit and the District Court and alleviate the absurdity created by the decisions in those courts.

Regulation of hunting and fishing on the post-1948 reservation lands will also fall to the YST. The YST currently sells separate hunting licenses for tribal and reservation lands and provides enforcement of its hunting regulations. Persons who possess

a YST hunting license will be able to hunt the post-1948 reservation lands regardless of whether the landowner consents to said activity because the license gives them the right of access to these lands. Further, members of the YST are permitted to hunt and fish tribal and reservation lands, including the post-1948 reservation lands, without first obtaining the permission of the landowner. Clearly, the affected landowners will not be able to control who has access to their property for purposes of hunting and fishing. More importantly, it is quite possible that the YST could require a landowner to purchase a YST hunting license to hunt his own land since the property that he owns is reservation under *Podhradsky*.

c) Insurance and marketability issues.

The ability of the YST to have unfettered access and control of the hunting and fishing on the post-1948 reservation lands certainly affects the insurability of the landowner and his property. It is common knowledge that insurance companies rely primarily on risk assessment in order to hedge their position in a transaction and make a profit. In short, the greater the risk, the higher the premium to be charged to an insured. If a landowner cannot control access to his property for purposes of hunting, fishing or other activities, he certainly will be subjected to either increased premiums or cancellation of his insurance coverage. If insurance is unaffordable or unavailable due to risk factors beyond the landowner's control, the landowner will be exposed to personal liability in

the event of an injury as a result of an activity on his property. Further, if he has no insurance, he stands to lose his home, business and other assets in order to satisfy a damage claim.

In light of the post-1948 reservations created by the *Podhradsky* decision, the marketability of the landowners' property will also be adversely affected. This has an impact upon the landowner, or his heirs, if a decision is made to sell the property. It also has an impact on the use of the property for collateral in banking transactions.

Two key elements exist in any sale transaction involving real property. First, the seller wants to be able to market his land based upon what it has to offer prospective purchasers. Second, the purchaser wants to purchase real property that he can use either as a business/investment endeavor or for recreation. Land prices in Charles Mix County have risen dramatically over the past several years, largely due to hunters who desire to secure a place to hunt during South Dakota's excellent hunting seasons. If many people have access to the land for hunting purposes and that access cannot be controlled by the owner of the property, its marketability from a hunting standpoint is reduced if not completely eliminated. If the property cannot be insured due to the unlimited access of others to the property or the control of same by the YST, then the marketability of the property is, once again, severely hampered or completely eliminated. If landowners cannot control the access to their property so as to protect their

crops, livestock and land, the marketability of the property from an agricultural standpoint is substantially reduced as well.

In addition, financial institutions base the amount of a loan upon the value of the collateral. The value of the collateral is based directly upon the ability to sell same in the event of a default on the note. If the marketability of the property is adversely affected due to its status as reservation land, the financial institution will not loan money, or as much money, as it might have otherwise loaned had the reservation impediment not been present.

B. Discriminatory effect of *Podhradsky*.[4]

Under federal and state law CME and RCWD are obligated to refrain from discriminatory rate practices in the operation of their businesses. The entities are permitted to discriminate between classes on their rates, but cannot discriminate within a class. Consequently, the same rate must be charged to a class of consumers, whether Indian or non-Indian, regardless of where the services are provided. Moreover, the ability of the YST to tax the entities and control rates, govern enforcement actions, and, to a certain degree, control other aspects of the operation of

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[4] A detailed discussion of the history and financial obligations of CME is contained in the *Amicus Curiae* Brief of Charles Mix Electric Association, Inc and Rosebud Electric Cooperative, Inc.

utility companies is directly tied to the status of the land. If the issue involving the mini reservations and the post-1948 reservation lands created by *Podhradsky* is not reversed on appeal, it will certainly have a discriminatory effect on the landowners.

Currently, the YST does not have an ordinance governing utilities, but, in light of *Podhradsky*, it is merely a matter of time before such an ordinance will be enacted. Other Indian tribes have already enacted ordinances to regulate utilities and it is clear that a trend has been established among the tribes to enact these ordinances. *See*, *Amicus Curiae* Brief of Charles Mix Electric Association, Inc., and Rosebud Electric Cooperative, Inc., at 5, n. 5. The current governing law arguably permits the YST to engage in regulatory actions over CME and RCWD on the mini reservation lands and the post-1948 reservation lands. *See*, *Montana*, 450 U.S. at 544; *Strate v. A-1 Contractors*, 520 U.S. at 438; *Plains Commerce Bank*, 554 U.S. at 316. Consequently, the YST could require the utility provider to charge a lower rate to the Indian person who resides on the mini reservation lands than other consumers who receive the exact same services. Moreover, the YST can govern the termination of services for the Indian consumer on the mini reservation lands under its ordinances and can do so in a fashion that is different in nature and manner than what applies to other utility consumers.

In addition, CME and RCWD have financing for infrastructure and other improvements which are directly tied to their rates. Consequently, if their

rates fall below a certain level, they will be considered in default of their loans and same could be foreclosed or their operations could be taken over by their funding agency. *See, Amicus Curiae* Brief of Charles Mix Electric Association, Inc., and Rosebud Electric Cooperative, Inc., at. 2-5. If the YST requires the utility providers to impose rates on the mini reservation lands that are less than that which are charged to other consumers, then the utility providers will necessarily be required to increase their rates to the other users so that they can meet their obligations under the financial agreements. The net effect is that the Indian consumers who reside on the mini reservation lands will enjoy an inordinately low utility rate while the other users' utility rates will skyrocket. This affects all of the CME and RCWD consumers and not simply the consumers who reside in the area affected by *Podhradsky*.

In addition to the above, the Wagner School District is situated on post-1948 reservation land. The school has in place certain disciplinary measures and other rules and regulations to govern not only the students at its facilities, but the staff as well. Since the school facilities are now located on a reservation under *Podhradsky* the complexion of the discipline and other controls at the Wagner School System will change dramatically. Clearly, non-Indian students will be treated differently than Indian students in light of the jurisdictional issues associated with reservation lands. The landowners will now be in a position where not only will their businesses, property

rights and other interests be directly affected by the *Podhradsky* decision, but also their children's lives will be dramatically, and perhaps adversely, impacted in an educational setting.

C. Conflicts of the decisions.

The Petitions for Writ Certiorari submitted by the State of South Dakota, Charles Mix County and Southern Missouri Recycling and Waste Management District clearly set forth the conflicts which exist with the *Podhradsky* decision and other decisions rendered by the South Dakota Supreme Court, the Eighth Circuit, and this Court. *Podhradsky* is in direct conflict with at least two South Dakota Supreme Court cases. *See, State v. Greger*, 559 N.W.2d 854 (S.D. 1997) and *Bruguier*, 599 N.W.2d at 364. Moreover, *Podhradsky* leaves a clear conflict with the decisions rendered by the Eighth Circuit as well. In the first instance, if the language in *Podhradsky* were eliminated regarding the affected non-Indian landowners who acquired their property post-1948, there would be no conflict with *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999), nor with the recent decision in *Yankton Sioux Tribe v. United States Corps of Engineers*, 606 F.3d 895 (8th Cir. 2010), but there would remain a conflict as a result of the creation of reservations regarding the lands held in trust. On the other hand, if *Podhradsky* stands, it will clearly be in conflict with the *Gaffey* and the *Corps of Engineers* decisions with reference to the post-1948 lands as well as the trust lands.

The *Podhradsky* decision is also in conflict with this Court's decisions in *Yankton* and in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), with regard to a number of issues, but primarily in reference to the extinguishment of the boundaries of the 1858 YST reservation. This Court declined to fully resolve the boundary issue in *Yankton*. That issue is now ripe and should be decided by this Court.

CONCLUSION

The *amicus curiae* landowners request the United States Supreme Court grant the Petitions for Writ of Certiorari filed by the State of South Dakota, Charles Mix County and Southern Missouri Recycling and Waste Management District.

Dated this 21st day of February, 2011.

Respectfully submitted,

TIMOTHY R. WHALEN
WHALEN LAW OFFICE, P.C.
301 Main Street
P.O. Box 127
Lake Andes, SD 57356
Telephone: 605-487-7645
Email: whalawtim@cme.coop

Attorney for Amicus Curiae Colin Soukup, representing the Frank Soukup Family Limited Partnership, and Dan Cimpl

182 (4) (5)

Nos. 10-929/10-931/10-932

Supreme Court, U.S.
FILED
FEB 22 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DENNIS DAUGAARD,
GOVERNOR OF SOUTH DAKOTA, *et al.*,
Petitioners,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

SOUTHERN MISSOURI RECYCLING AND
WASTE MANAGEMENT DISTRICT,
Petitioner,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

PAM HEIN, STATE'S ATTORNEY OF
CHARLES MIX COUNTY, SOUTH DAKOTA, *et al.*,
Petitioners,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RANDALL COMMUNITY WATER DISTRICT, *AMICUS CURIAE*, IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

BRADLEY D KERNER
KERNER LAW OFFICE
PO Box 371
Armour, SD 57313
Telephone: 605-724-2313
Email: kernerlaw@unitelsd com
Attorney for amicus curiae
Randall Community
Water District

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICUS CURIAE*[1]

In October 1976, the Randall Community Water District was incorporated under the laws of the State of South Dakota. South Dakota Codified Laws § 46A-9 (SDCL). The stated purpose of the Randall Community Water District was to pump, treat, and distribute potable water to rural customers and rural communities in several South Dakota counties. To date, the Randall Community Water District includes all of Charles Mix County and all of Douglas County, as well as portions of Aurora County, Bon Homme County, Brule County and Hutchinson County, all in central and southeastern South Dakota.

The local communities that are served in these counties include Armour, Aurora-Brule Rural Water System Inc., Corsica, Davison Rural Water System Inc., Delmont, Geddes, Lake Andes, Pickstown, Platte and Wagner. Native Americans live throughout this area and have individual accounts, as well as bulk users' accounts, with the Randall Community Water District.

In 2010, the total sales for the Randall Community Water District was 955,000,000 gallons. Native

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. Written consent of all parties accompanies this brief. No counsel for a party authored any part of this brief. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Only the identified *amicus curiae* made monetary contributions and funded the preparation and submission of this brief.

American individuals (180 individual accounts) and Native American bulk users (5 bulk users' accounts) purchased a total of 59,000,000 gallons.[2] In all, this is approximately six percent of the total sales of the Randall Community Water District.

To serve the total area, Randall Community Water District has 1,766 miles of pipeline. The 2010 compliance review required by the United States Department of Agriculture confirms that the total population served in the area is 13,119 individuals, with a total Indian population of 2,679 individuals. Approximately 240 miles of pipeline are within the contested area. United States Department of Agriculture Form RD 400-8 (Compliance Review) dated April 1, 2010.

1. The future of the Randall Community Water District is tied to dependable revenue sources to cover the cost of production and related expenses. Rates are established and that rate is maintained for all accounts served. In addition, rates need to be increased periodically as costs increase. Again, these increases apply to all accounts served, including tribal and individual Indian accounts.

Jurisdiction within the limits of an Indian reservation is extremely complicated. To date, Randall Community Water District has not been substantially

[2] These bulk users include Greenwood, Marty, North Wagner Housing, Ft. Randall Casino and Yankton Sioux Tribe Truck Plaza

impacted by tribal jurisdiction or the absence of state jurisdiction because the area has not been considered to be within the limits of an Indian reservation by state law. The decision of the court of appeals recognizes a sizable noncontiguous Indian reservation in this area consisting of all trust lands and arguably including hundreds of thousands of acres of fee lands. That recognition poses a real problem for the stability of this Water District.

2. The Randall Community Water District is entirely dependent on statutorily conferred powers. For example, the Water District operates within right-of-way easements. The entire process involved in right-of-way easements will be impacted by the court of appeals decision, placing reservation boundaries around all trust lands and an unknown amount of additional fee lands.

Because the decision of the court of appeals recognizes an Indian reservation that was purportedly established by Congress years ago, the effect of that reservation status on existing easements is unknown. Moreover, reservation status will affect the process for future easements needed for service and growth in the Randall Community Water District.

3. Similarly, powers of eminent domain set forth in SDCL 46-9-51 will be impacted by reservation status. Competing claims in this area of the law are unclear within Indian reservations.

4. The regulatory claims of tribal governments are also enhanced by the decision of the court of appeals.

The Randall Community Water District shares the concern noted in the *amicus curiae* Brief of Charles Mix County Electric Association, Inc. and Rosebud Electric Cooperative, Inc. in Support of the Petitions for Writ of Certiorari in this case. As the excerpts in the tribal code in Appendix A of that *amicus curiae* brief attest, similar regulatory claims in the Yankton area tied to reservation status will present an almost insurmountable problem for entities like the Randall Community Water District.

ARGUMENT

The Randall Community Water District would submit that expertise in Indian law is not needed to see what is wrong in this litigation. That is, namely, the failure of the lower courts to give proper weight to the almost "insurmountable presumption of disestablishment" previously established by the Court that should have controlled this case from the beginning. The first time, the district court resurrected 1858 reservation boundaries long deemed disestablished. The second time, the district court still recognized 1858 reservation boundaries despite the opinion of this Court in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). The third time, the district court parlayed a one thousand acre reservation mistakenly recognized by the court of appeals into a new 37,000 acre reservation, again contrary to the presumption set forth in *Yankton Sioux Tribe*, 522 U.S. at 344-345.

Neither the lower courts nor the parties should have been free to slight the disestablishment presumption.

As Charles Mix County noted in the County's Petition, it bears repeating that in oral argument, this Court *stressed* the controlling nature of this presumption.

> Tribe: The cession and the sum certain language . . . it's just *boilerplate* . . .
>
> Court: But this Court has said it's nearly *irrebuttable*.
>
> Court: That's what *Solem* said.
>
> Tribe: No . . . I say the presumption is that the Indians *retain* the reservation and it's up to the State to rebut
>
> Court: But then you must, mustn't you, if you're taking that position, say, "Court, you were wrong; you should qualify or even overturn your precedent" . . .
>
> Court: If we're faced with something . . . almost irrebuttable . . . why does the part that's uncertain dominate what we have said is a *very strong presumption*?

Transcript of Oral Argument at 37, 38, 39, *Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581) (emphasis added).

This strong presumption of disestablishment constitutes the rule of law in this case and every

other case like it. That is the function of a presumption. The failure of the lower courts to properly deal with this presumption is worthy of the attention of this Court.

Instead of relying primarily on the presumption of disestablishment and text of the agreement, the court of appeals used "context" as its source of treaty interpretation, *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1020 (8th Cir. 1999), cert. denied, 530 U.S. 1261 (2000). Relying on the divided opinion of this Court in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), dealing with general treaty language, the court of appeals ignored *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and the presumption of disestablishment recognized since *DeCoteau*, and found that "similar treaty language does not necessarily have the same effect when dealing with separate agreements." *Gaffey*, 188 F.3d at 1020. In fact, to the court of appeals the "cession and sum certain" language meant virtually nothing, as did the near *identity* of the agreements, not to mention the presumption. The court of appeals, in practical terms, regarded the Yankton Agreement as a blank slate to be filled in with whatever evidence of historical "context" it determined to be persuasive. There are several reasons why the approach of the court of appeals is fundamentally impermissible and fundamentally incorrect.

First, *Mille Lacs* is simply not applicable. *Mille Lacs* addresses an argument that claimed that when

general treaty language had been used in a 1901 agreement with a tribe on the west coast and had been interpreted in a certain way, it must have the same meaning as "similar" language in an agreement a half century earlier in Wisconsin, despite other facts to the conrary. That is *Mille Lacs*.

In this case, this Court has unanimously and unambiguously interpreted the meaning of the "cession" and "sum certain" language, first in *DeCoteau* and then in the case of the Yankton Agreement itself. *Yankton Sioux Tribe*, 522 U.S. at 344. Regardless of how *Mille Lacs* might be interpreted in a context in which this Court has not already ruled on the meaning of general treaty language, *Mille Lacs* has no application in a situation in which the Court has ruled on the meaning of language of the very agreement at issue. The approach of the court of appeals makes the emphatic language of this Court in *Yankton Sioux Tribe* mere *obiter dictum*, surely an egregiously erroneous use of *Mille Lacs*.

Second, the "cession and sum certain" language does, in fact, have a well established meaning in Indian law, unlike the more general language construed in *Mille Lacs*. This Court has emphasized its importance when finding disestablishment, as in *DeCoteau v. District County Court*, 420 U.S. at 445, and has emphasized its absence when declining to find disestablishment. This Court found an agreement lacking "cession and sum certain" to "stand in sharp contrast to the explicit language of cession employed in the Lake Traverse and the 1904 Rosebud

Acts." *Solem v. Bartlett*, 465 U.S. 463, 473 (1984). *See also, Hagen v. Utah*, 510 U.S. 399, 411-412 (1994).

Third, the appropriate mode of construction of the Yankton Agreement has already been set by this Court. *Yankton Sioux Tribe* indicated that although Congressional intent was perceptible from the "plain statutory language" it would also take "note of the contemporary historical context, subsequent congressional administrative references to the reservation and demographic trends." *Yankton Sioux Tribe*, 522 U.S. at 351. Thus, *Yankton Sioux Tribe* stands as an insurmountable barrier to discarding the meaning of the "plain statutory language." Rather, the language has primacy and the additional factors can be examined in addition to the language.

It has been twelve years since the decision of this Court in *Yankton Sioux Tribe*. At one point, the federal district court did not schedule a hearing for four years. No other case decided by this Court has required a process like this to decide whether an area is inside an Indian reservation. *See DeCoteau v. District County Court*, 420 U.S. 425 (1975) and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). The nearly irrebuttable presumption of disestablishment should have effectively precluded the bizarre nature of the litigation in this case.

CONCLUSION

For the foregoing reasons, and those stated in the Petitions of the State of South Dakota, Charles Mix County and Southern Missouri Recycling and Waste Management District, the Petitions for Writ of Certiorari should be granted.

Dated this 22nd day of February, 2011.

Respectfully submitted,

BRADLEY D. KERNER
KERNER LAW OFFICE
PO Box 371
Armour, South Dakota 57313
Telephone: 605-724-2313
Email: kernerlaw@unitelsd.com
Attorney for amicus curiae
Randall Community
Water District

182 (3) (3) (4)

Nos. 10-929/10-931/10-932

FEB 22 2011

In The
Supreme Court of the United States

DENNIS DAUGAARD,
GOVERNOR OF SOUTH DAKOTA, et al.,
Petitioners,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

SOUTHERN MISSOURI RECYCLING AND
WASTE MANAGEMENT DISTRICT,
Petitioner,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

PAM HEIN, STATE'S ATTORNEY OF
CHARLES MIX COUNTY, SOUTH DAKOTA, et al.,
Petitioners,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

AMICUS CURIAE BRIEF OF WAGNER COMMUNITY SCHOOL DISTRICT NO. 11-4 IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

SCOTT J. PODHRADSKY
107 South Main
PO Box 370
Wagner, South Dakota 57380
Telephone (605) 384-5471
Email law@podhradsky.com
Attorney for Amicus Curiae
Wagner Community School District No 11-4

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Pursuant to Supreme Court Rule 37(2), Wagner Community School District No. 11-4, of Wagner, South Dakota, hereby respectfully submits this brief as *amicus curiae* in support of the Petitions for Writ of Certiorari filed by the State of South Dakota, Charles Mix County, and Southern Missouri Recycling and Waste Management District.

INTEREST OF *AMICUS* SCHOOL[1]

Wagner Community School District No. 11-4 ("School" herein) owns real property which is a part of the approximately 8,000 acres of fee property that are directly affected by the decision rendered by the Eighth Circuit Court of Appeals in *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. Aug. 25,

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. Written consent of all parties accompanies this brief. Counsel of record for the school is an associate in a law firm that has represented the school and Southern Missouri Waste Management for years. Southern Missouri Waste Management District is a party in this case. Counsel authored the brief in Southern Missouri Waste Management in whole or in part. Counsel is not counsel of record for Southern Missouri Waste Management. Charles Mix County is a rural area with more legal problems than lawyers. With this acknowledgement, counsel submits that this brief is in substantial compliance with Supreme Court Rule 37(6). No counsel or party made a monetary contribution intended to fund the preparation or submission of this *amicus curiae* brief for the School and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution.

2009), as amended by *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985 (8th Cir. 2010). The Wagner School is located on part of this fee property. This fee property is within the city limits of Wagner. In its original (2009) decision, the Eighth Circuit Court of Appeals in dicta opined that after the enactment of 18 USC § 1151 in 1948, allotted land to which the Indian title has been extinguished still retained its status as Indian land. Prior to the enactment of § 1151, the settled law held that when allotted land passed to a non-Indian, the land was no longer considered Indian country. *See* 18 USC § 1151(c). However, in its 2009 decision, the court indicated that after the passage of § 1151 allotted lands sold to non-Indians still retained its Indian country status as a "reservation" under 18 USC § 1151(a).

ARGUMENT

1. The Wagner Community School District No. 11-4, hereinafter referred to as School, is a community school educating children from kindergarten through twelfth grade. The 225,000 square foot structure is situated on an 78.77 acre parcel of land located in the city limits on the western side of the City of Wagner, Charles Mix County, South Dakota. App. 1 *infra*, is an aerial view of the School's fee property, an isolated, non-contiguous tract of fee land that the panel placed within the limits of the Yankton Sioux Reservation. The school building contains numerous classrooms, laboratory rooms, a library,

auditorium with stage, shop rooms, two gymnasiums, a cafeteria, a swimming pool, administrative offices and utility rooms. It has a value in excess of fifteen million dollars and employs 155 people. Total student population is 777 with 391 of those being Indian and 386 being non-Indian. Also contained on the property is an outdoor football/track stadium along with two baseball fields and parking areas. The school also provides early learning services to children ages three and four, with approximate enrollment of 94 Indians and 40 non-Indians. The legal description of the property is Lot Four (4) and the Southwest Quarter of the Northwest Quarter (SW1/4NW1/4) less Lot H-1 in Lot 4, all in Section Four (4), Township Ninety-Five (95) North, Range Sixty-Three (63) West of the Fifth Principal Meridian, Charles Mix County, South Dakota, containing 78.77 acres, more or less. Lot H-1 of Lot 4 is occupied by the Wagner Fire Protection District, a political subdivision.

2. The panel decision conflicts with decisions of this Court and of the court of appeals and consideration by this Court is therefore necessary. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (YST), *DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), *Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87 (8th Cir. 1975), *Cook v. Parkinson*, 525 F.2d 120 (8th Cir. 1975), *Beardslee v. United States*, 387 F.2d 280 (8th Cir. 1967), *United States v. Stands*, 105 F.3d 1565 (8th Cir. 1997), *United States v. Provost*, 237 F.3d 934 (8th Cir. 2001) (former Yankton allotted

lands not reservation), and most recently *YST v. U.S. Army Corps of Engineers*, 606 F.3d 895 (8th Cir. 2010). The panel decision also conflicts with decisions of this Court and the court of appeals that have construed the General Allotment Act of 1887 (24 Stat. 388 (1887)).

3. This proceeding involves several questions of exceptional importance. The panel decision presents a question of exceptional importance because it squarely conflicts with a long line of *YST* decisions of the South Dakota Supreme Court (cited favorably by this Court in *YST* at 342, n.4), including *State v. Greger*, 559 N.W.2d 854 (S.D. 1997). *See also State ex rel. Hollow Horn Bear*, 95 N.W.2d 181 (1959) and *Bruguier v. Class*, 599 N.W.2d 364, 371 (S.D. 1999) ("congressionally terminated"). The panel decision conflicts with the authoritative decisions of other United States Court of Appeals that have addressed the issue. *Little Light v. Crist*, 649 F.2d 682 (9th Cir. 1981); *Ellis v. Page*, 351 F.2d 250 (10th Cir. 1965).

4. The panel again affirmed the district court. *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. 2009). Incredibly, the panel, on its own notion, also incorrectly added over another 8,000 acres of noncontiguous *non-Indian fee land* to this unprecedented reservation because of a misreading of the generic Indian country statute, 18 USC § 1151, (that never mentioned the Yankton reservation and was passed in 1948, more than a half century after the Yankton Act).

In the process, no one was even given an opportunity to brief the 18 USC § 1151(a) reservation status of this fee land: not the State, not the County, not the United States, not the Tribe, and most importantly, not the landowners, with lives and property impacted ("within the limits" of a reservation), without *any* notice. This unprecedented holding was the direct result of the district court and the panel continuing to ignore the very strong presumption of diminishment/disestablishment. A subsequent Order on rehearing removed this language from the panel opinion. However, the practical consequences of the Order are unclear. *See* State Brief 4-5, 13-16, 34-35.

This Court should authoritatively resolve the post 1948 fee land issue. First, as the State has pointed out, the Order deleting the post 1948 fee land footnote is just a short term fix. The rationale for including post 1948 fee lands with 18 USC § 1151(a) reservation boundaries has not been completely withdrawn from the panel's opinion. As a result, the text of the panel opinion will undoubtedly be used in future litigation to argue that post 1948 fee lands are within the limits of an 18 USC § 1151(a) reservation. Secondly, post 1948 fee land expressly conflicts with the allotments in fee holding in *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir.), *cert. denied*, 530 U.S. 1261 (2000).

Another portion of the panel's opinion also merits attention. The panel recognizes reservation boundaries around all Indian allotments still held in trust. This holding also conflicts with allotment/fee holding

in *Gaffey*, and conflicts as well with the recent *Corps* case that expressly adopted this aspect of *Gaffey* as the holding in the *Corps* case. If the panel is correct that all allotments now held in trust are encompassed in 18 USC § 1151(a) reservation boundaries, then *Gaffey* could not have been correct in holding that allotments, now in fee, are not within 18 USC § 1151(a) reservation boundaries. In other words, 18 USC § 1151(a) boundaries do not automatically disappear just because a fee patent is issued. And 18 USC § 1151(a) reservation boundaries are not automatically resurrected because dicta in an opinion is taken out of context by the panel.

Congress has a role in this reservation boundary process that the court of appeals has not respected. Felix Cohen made clear that Congress did not address reservation boundaries after the passage of the Yankton Act (which disestablished the 1858 reservation boundaries). If any allotments were within an 18 USC § 1151(a) boundary at any time after the proclamation in the Yankton Act, *Gaffey* was wrongly decided. This conflict should be resolved. All of this confusion could have been avoided if the panel would have appropriately deferred to a century of precedent in the State of South Dakota. Clearly, South Dakota opinions are entitled to more respect than they received in any of the panel's decisions. Along these lines the panel should have accorded this Court's treatment of the South Dakota opinions more respect.

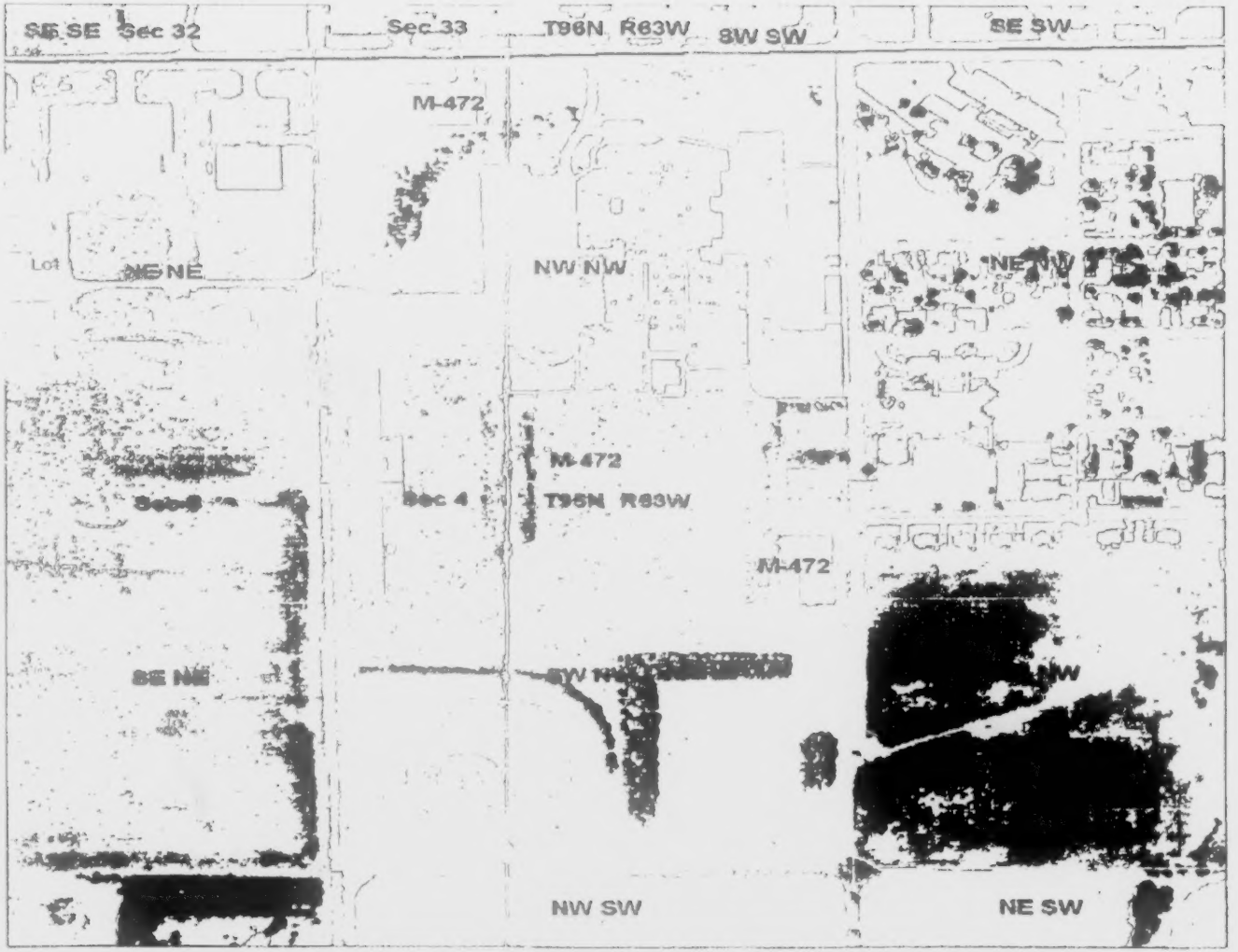
CONCLUSION

The decision of the court of appeals conflicts with the decision of the State Supreme Court in *Bruguier*. It also appears that there exists conflicting published opinions in the Eighth Circuit as to whether any allotted lands in Charles Mix County have reservation boundaries around them. It appears that *Podhradsky II* in part reverses *Gaffey II*.

Respectfully submitted,

SCOTT J. PODHRADSKY
P.O. Box 370
Wagner, SD 57380
(605) 384-5471

App. 1



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